No. 90-1167

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE BOARD OF PUBLIC EDUCATION and ORPHANAGE FOR BIBB COUNTY, *et al.*,
Petitioners,

v.

DAVID LUCAS, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under Georgia law, elected school boards are given exclusive authority to decide whether capital improvement projects will be undertaken and how they will be financed. If a school board (or any other local governmental body in Georgia) decides to fund a capital improvement through bonded indebtedness, the issuance of the bonds must be approved by the voters in a referendum.

The questions presented by this petition are:

1. Whether the Court of Appeals improperly expanded Section 2 of the Voting Rights Act (which prohibits any voting qualification, prerequisite to voting or standard, practice or procedure abridging the right to vote) by empowering voters themselves, in contravention of the exclusive authority vested in elected school boards, to challenge a policy decision of a school board as to what bond issues to submit to the voters?

2. Whether the Court of Appeals' ruling under Section 2 of the Voting Rights Act is inconsistent with this Court's summary affirmance *in this case* of a three-judge district court's ruling under Section 5 of the Voting Rights Act that a school board's decision as to what bond issues to submit to the voters is *not* a voting qualification, prerequisite to voting or standard, practice or procedure with respect to voting?

THE PARTIES

The petitioners before this Court are the Board of Public Education and Orphanage for Bibb County; Stephen Massey in his official capacity as President of the Board of Education; the Bibb County Board of Commissioners; Larry Justice in his official capacity as Chairman of the Bibb County Board of Commissioners; the Macon-Bibb County Board of Elections; A. B. Caldwell in his official capacity as Chairman of the Macon-Bibb County Board of Elections; and Bernard Fletcher in his official capacity as Superintendent of the Macon-Bibb County Board of Elections. The respondents before this Court are David Lucas, Willie Davis, Jr., Connie Cater, Corlis McKenzie and Ronnie T. Miley.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 908 F.2d 851 and is reprinted as Appendix A to this Petition. The Order of the District Court is reported at 714 F. Supp. 525 and is reprinted as Appendix B. The unpublished Order of the Court of Appeals denying the Petition for Rehearing is reprinted as Appendix C.

The Orders of the District Court of three judges, convened under Section 5 of the Voting Rights Act, are reported at 698 F. Supp. 909 and 732 F. Supp. 1581 and are reprinted as Appendices D and E. The Decision of this Court summarily affirming the judgment of the District Court of three judges is reported at 110 S. Ct. 858 and is reprinted as Appendix F.

JURISDICTION

The opinion of the Court of Appeals was entered on August 9, 1990. 908 F.2d 851 (App. A). A timely Petition for Rehearing was denied on October 30, 1990. (App. C). This Court has jurisdiction under 28 U.S.C.A. Section 1254(1) (West Supp. 1990).

STATUTE INVOLVED

This case involves Section 2 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973 (West Supp. 1990), which provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in Section 1973b (f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circum-

stances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT OF THE CASE

County school boards in Georgia are vested with broad authority to govern, manage and control local schools and to "make all arrangements necessary to the efficient operation of the schools." O.C.G.A. §§ 20-2-520, 20-2-50; *Wells v. Banks*, 153 Ga. App. 581, 266 S.E.2d 270 (1980). Pursuant to this authority, the Board adopted a comprehensive capital improvement plan to air condition 17 existing schools, construct a new high school and a new middle school,[1] and renovate an existing high school for use as a magnet school. 908 F.2d 851, 852 (App. A at 2a); 714 F. Supp. 525, 526 (App. B at 17a-18a). To fund this plan, the Board decided to issue $29 million of bonded indebtedness.

Under Georgia law, a decision by a school board or other local governmental body to issue bonds must be approved by the voters through a referendum. Ga. Const. art. IX, § V, ¶ I. Accordingly, the Board scheduled a bond referendum for November 8, 1988, in connection with a general election on that date. 908 F.2d at 853

[1] The new schools were to serve student bodies of approximately 50% black students and 50% white students. *Lucas v. Townsend*, 714 F. Supp. 525, 526 (M.D. Ga. 1989) (App. B at 17a).

(App. A at 4a). The question to be presented to the voters in the referendum was as follows:

> SHALL GENERAL OBLIGATION SCHOOL BONDS IN THE AMOUNT OF $29 MILLION BE ISSUED BY BIBB COUNTY?

Acting upon the Board's request, the Attorney General of the United States precleared the referendum date under Section 5 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973c (the "Act"). 908 F.2d at 853 (App. A at 4a). Prior to that date, respondents, who are registered voters in Bibb County, sued the Board to enjoin the bond referendum under Section 5 of the Act. Respondents argued that the Board's decision to submit the $29 million bond issue to the electorate as a single, combined question—rather than having a separate question on each component of the capital improvement plan —constituted a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" under Section 5, 42 U.S.C.A. § 1973c. 908 F.2d at 852-53 (App. A at 3a).

A district court of three judges (the "Three-Judge Court") was convened pursuant to Section 5. In response to the Three-Judge Court's invitation, the Attorney General of the United States filed a brief as *amicus curiae*. The Attorney General took the position that the decision to include funding for several related projects in a single bond issue was not a voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting under Section 5. Adopting the Attorney General's position, the Three-Judge Court denied respondents' motion for a preliminary injunction and held that the Board's decision to submit the $29 million bond issue to the electorate as one question was simply a "normal legislative decision unrelated to the process of holding elections." 698 F. Supp. 909, 912 (quoting Brief for the United States as *Amicus Curiae* in the United States District Court for

the Middle District of Georgia at 16) (App. D at 43a). The court also concluded that the Board formulated the question in a manner consistent with Georgia law as it had existed both before and after the benchmark date contained in Section 5. *Id.* (App. D at 43a).

On November 8, 1988, the referendum took place as scheduled and was approved by the voters. 908 F.2d at 853 (App. A at 5a). On March 7, 1989, the Three-Judge Court issued a Final Order entering judgment against respondents on their Section 5 claim. 732 F. Supp. 1581 (App. E at 45a).

Respondents appealed to this Court. The Attorney General was again invited to file a brief as *amicus curiae*. The Attorney General took the same position as in the lower court, again expressing the view that this type of discretionary decision "concerning the content of a bond issuance referendum did not require preclearance because it was not a voting matter within the purview of Section 5." (Brief for the United States as *Amicus Curiae* in the Supreme Court of the United States at 11). On January 22, 1990, this Court summarily affirmed the judgment of the Three-Judge Court denying respondents' claim for relief under Section 5. *Lucas v. Townsend*, 110 S. Ct. 858 (1990) (App. F at 46a).

Having failed under Section 5, respondents then attempted to persuade a single-judge district court (the "District Court") that the conduct found *not* to be a "standard, practice, or procedure" affecting voting under Section 5, *was* nevertheless a "standard, practice or procedure" abridging the right to vote under Section 2 of the Act. The District Court rejected respondents' argument and held that the exercise of discretion by validly elected local bodies in deciding to fund a comprehensive capital improvement plan through a single bond issue was not a standard, practice or procedure abridging the right to vote. 714 F. Supp. 525, 534 (App. B at 35a). As the District Court explained:

> The Voting Rights Act addresses the right to vote; it does not address the deliberative process of local or state boards. . . . *Elected bodies like the School Board of Bibb County, comprised of individuals nominated and elected in presumably valid elections in which all voters had an equal opportunity to participate, must be afforded some freedom to engage in the traditional political tools of consensus-building and compromise to effectuate comprenhensive plans for school and community development and improvement.* Government in the United States, be it federal, state or local, takes the form of representative democracy. That does not mean, of course, that representatives once elected are free to disregard the law; however, the functioning of a representative democracy must be contrasted with the functioning of a pure democracy. Representatives are elected to pursue an agenda which benefits the community at large. They may be re-elected or cast out of office, depending upon their performance or lack thereof. This scheme of government does not contemplate a vote by every individual on every single issue in isolation or in the abstract. . . .
>
> To accept [respondents]' position in this matter is to invite chaos. Any and all matters which are to be submitted to the electorate for its approval or disapproval, be that matter a proposal by a local board for a bond issue to construct a new high school or be it an amendment proposed by a state legislature, would be subject to challenge under the Voting Rights Act. This Court finds [respondents]' position unfounded either in law or in logic.

714 F. Supp. at 532-33 (App. B at 30a-32a) (emphasis added).

Respondents appealed to the United States Court of Appeals for the Eleventh Circuit. Despite the fact that this Court had summarily affirmed the Three-Judge Court's decision denying respondents' claim under Section 5, and even though the Attorney General had twice filed *amicus*

curiae briefs disagreeing with respondents' contention, the Eleventh Circuit issued a 2-1 decision on August 9, 1990, reversing the judgment of the District Court. 908 F.2d 851 (App. A).

Rejecting the reasoning of the Attorney General, the Court of Appeals held in essence that the very same action that *was not* a standard, practice or procedure affecting voting under Section 5, *was* a standard, practice or procedure having the potential to abridge the right to vote under Section 2. 908 F.2d at 857-58 (App. A at 13a-14a). Even though state law vests the Board with the exclusive authority to decide what bond issues to submit to the voters, the Court of Appeals held that "[m]inority communities have the right to vote for or against the *propositions of their choice* just as they have the right to a fully effective vote to elect candidates of their choice." 908 F.2d at 858 (App. A at 14a) (emphasis added).

In dissent, former Chief Judge Roney adopted the reasoning of the District Court and the Attorney General that the exercise of discretion by a validly elected local governmental body in deciding to fund a comprehensive capital improvement plan through a single bond issue is not a standard, practice, or procedure abridging the right to vote. *Id.* at 858-59 (App. A at 16a).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION INVADES THE LEGISLATIVE DISCRETION OF VALIDLY ELECTED LOCAL GOVERNMENTAL BODIES AND IMPROPERLY RESTRICTS THE OPERATION OF LOCAL GOVERNMENT.

Georgia law vests local county school boards with broad authority to govern, manage and control local schools and to "make all arrangements necessary to the efficient operation of the schools." O.C.G.A. §§ 20-2-520, 20-2-50; *Wells v. Banks*, 153 Ga. App. 581, 266 S.E.2d 270 (1980).

Thus, the Board is vested with the discretion to decide how to manage the schools, including how to fund capital improvements. The voters exercise control over the Board through elections of Board members.[2] If voters are dissatisfied with the performance of the Board, they may cast their votes to elect new members. The only local government issue on which voters have a direct voice is a decision by a local governmental body to incur bonded debt, which must be approved by the voters through a referendum. Ga. Const. art. IX, § V, ¶ I. The decision as to what bond issue(s) to propose to the voters, however, rests exclusively with the school board. O.C.G.A. § 20-2-430; *Miles v. State*, 96 Ga. App. 610, 614, 101 S.E.2d 173, 176 (1957) (quoting *Hart v. Board of Education*, 299 Mo. 36, 252 S.W. 441 (1923)).[3]

The Court of Appeals' decision invalidates this system of local representative government and purports to grant to the voters themselves, as opposed to their validly elected representatives, the right to decide what projects should be submitted to the voters for approval. In essence, the Court of Appeals' decision creates a right to vote—on what bond issues will be submitted to the voters—that does not exist under state law.

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[2] Bibb County is located in central Georgia. According to the 1980 census, it has a population of approximately 150,000. Approximately 38% of the County's population is black. The Bibb County School Board is a representative body of ten members elected by the voters of that county. Six of the members of the Board are elected from single member districts; two members are elected county-wide; a representative of the Bibb County Board of Commissioners and the Mayor of Macon fill the other two voting seats on the Board. The Board is composed of six whites (including one county-wide seat) and four blacks (including one county-wide seat). It is undisputed that the Board is properly composed under the Voting Rights Act. (R. 2-62).

[3] Indeed, the Court of Appeals specifically acknowledged (and respondents did not dispute) that Georgia law allows school boards to combine related projects in a single bond issue. 908 F.2d at 855 (App. A at 9a).

The Court of Appeals' ruling improperly restricts the operation of local governments. Local governmental bodies will be unable to fund many necessary and worthwhile projects that are in the best interests of the community as a whole. Indeed, if the voters are permitted to decide what capital improvement projects should be submitted to them in a bond issue referendum, then it will be virtually impossible for their elected representatives to forge the coalitions and compromises necessary to fund most projects. The Board's decision to fund a comprehensive capital improvement plan through a single bond issue is no different from a legislative committee's decision to include a certain combination of projects in an appropriations bill. Both decisions involve the exercise of legislative discretion over substantive policy matters. Neither constitute a policy, practice, or procedure *abridging the right to vote* under the Act. Just as Congress and the state legislatures depend on coalitions, compromises and consensus to accomplish their legislative goals, local representatives likewise depend on these legitimate legislative tools to perform their public responsibilities. Such compromises do not abridge anyone's right to vote. Each voter, if dissatisfied with a component of a bond program, may vote against the entire program.

The issue raised by this case affects thousands of local governmental bodies throughout the United States. The opinion of the Court of Appeals invades the legislative discretion of such validly elected local governmental bodies and undermines the most basic notions of local self government on which this country is founded. This case thus presents an important issue concerning the proper scope of the Voting Rights Act that is worthy of resolution by this Court.

II. THE COURT OF APPEALS' DECISION IMPROPERLY EXPANDS THE REACH OF THE VOTING RIGHTS ACT IN CONTRAVENTION OF THE LANGUAGE AND HISTORY OF THE ACT AND CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS COURT.

Congress enacted the Voting Rights Act to ensure the integrity of the registration and voting process. *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Delgado v. Smith*, 861 F.2d 1489, 1492 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 3242 (1989). The Act does not guarantee a particular political outcome, but ensures that the political processes are equally open to participation by all citizens. 42 U.S.C.A. § 1973(b) (West Supp. 1990); *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971).

Never has Congress expressed an intent to expand the Act to regulate policy decisions of validly elected representatives, as the Court of Appeals' decision purports to do here. The Court of Appeals' decision conflicts with the language and history of the Act and is inconsistent with prior decisions of this Court. Section 2 of the Act by its terms regulates only voting procedures: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote. . . ." 42 U.S.C.A. § 1973(a) (West Supp. 1990). A violation of Section 2 occurs if "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C.A. § 1973(b) (West Supp. 1990).[4]

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[4] The language "voting qualification or prerequisite to voting or standard, practice, or procedure" in Section 2 is virtually identical

The legislative history likewise indicates that Section 2 was intended only to protect "the right of minority voters to be free from election practices, procedures or methods that deny them the same opportunity to participate in the political process as other citizens enjoy." S. Rep. No. 417, 97th Cong., 2d Sess. 28 *reprinted in* 1982 U.S. Code Cong. & Ad. News 206.

Consistent with the language and history of the Act, this Court has repeatedly stated that the phrase "voting qualification or prerequisite to voting, or standard, practice or procedure" in the Act refers to rules and laws that embody election and voting procedures. *See, e.g., Allen v. State Board of Elections*, 393 U.S. 544, 563-67 (1969). Thus, the Act has been applied to procedural rules affecting the registration of voters, *id.* at 565-67 & n.31 (1969), the casting of votes, *id.* at 563, the tabulation of votes, *id.*, electoral system features such as at-large elections, *id.* at 569; *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 137-38 (1978), candidate qualification requirements, *Allen*, 393 U.S. at 570; *Dougherty County, Georgia Board of Education v. White*, 439 U.S. 32, 47 (1978); *Hadnot v. Amos*, 394 U.S. 358 (1969), reapportionment and redistricting plans, *Georgia v. United States*, 411 U.S. 526 (1973); *Thornburg v. Gingles*, 478 U.S. 30 (1986), and changes in the location of polling places, *Perkins v. Matthews*, 400 U.S. 397 (1971).

No other court has adopted the Court of Appeals' overly-broad interpretation of the Act. Indeed, this Court has twice summarily affirmed decisions of three-judge district courts under Section 5 refusing to expand the Act's coverage to policy decisions of local governmental

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to the reference in Section 5 to "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." *Compare* 42 U.S.C.A. § 1973 (West Supp. 1990) *with* 42 U.S.C.A. § 1973c.

bodies. In *White v. Dougherty County Board of Education*, 579 F. Supp. 1480 (M.D. Ga. 1984), *aff'd mem.*, 470 U.S. 1067 (1985), an employee of a county board of education sued the board, alleging that the board's action denying him a leave of absence for political purposes constituted a "policy, practice, or procedure with respect to voting" in violation of Section 5 of the Act. Rejecting the employee's claim, the district court of three judges held that the board's refusal to alter its neutral leave policy to allow employees elected to public office greater time away from the job "does not possibly constitute a Section 5 'standard, practice, or procedure.'" *Id.* at 1493.[5] This Court summarily affirmed the three-judge district court's ruling.

White is directly applicable here. Just as a neutral personnel policy of a local school board does not constitute a "standard, practice, or procedure" with respect to voting under Section 5, the Board's fiscal policy decision to submit a comprehensive $29 million education bond issue to the voters in a single referendum question does not

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[5] In an earlier lawsuit, the very same school board employee had sued the board, alleging that the board's Rule 58, which had required any school system employee who became a candidate for public office to take a leave of absence without pay for the duration of the candidacy, constituted a "policy, practice, or procedure with respect to voting" under Section 5. A three-judge district court agreed with plaintiff and enjoined the use of Rule 58. This Court affirmed in a 5-4 decision. *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32 (1978). Since Rule 58 specifically addressed the electoral process in the same manner as a filing fee law, it was a "standard, practice, or procedure" under Section 5. As this Court explained:

> Rule 58 is not a neutral personnel practice governing all forms of absenteeism. Rather, it specifically addresses the electoral process, singling out candidacy for elective office as a disabling activity. Although not in form a filing fee, the Rule operates in precisely the same fashion.

Id. at 40. The Board rescinded Rule 58 before the filing of the second lawsuit.

constitute a "standard, practice, or procedure" abridging the right to vote under Section 2.

Even more compelling than *White* is the decision of the Three-Judge Court convened under Section 5 in the present case. The Three-Judge Court rejected (under Section 5) the very same claim that respondents now raise under Section 2. The Three-Judge Court specifically held:

> [T]he form or structure of a question on a bond referendum is not a standard, practice or procedure affecting voting. The discretionary decision to submit one or more questions to the electorate is one properly left to the political process.

698 F. Supp. 909, 912 (App. D at 43a), *aff'd mem.*, 110 S. Ct. 858 (1990) (App. F at 46a). The Three-Judge Court also ruled that the Board formulated the question in a manner consistent with Georgia law as it existed both before and after the benchmark date in Section 5. *Id.* (App. D at 43a). As in *White*, this Court again summarily affirmed the ruling of the Three-Judge Court. 110 S. Ct. 858 (1990) (App. F).

The Court of Appeals' decision here is in direct conflict with *White* and the summary affirmance of the Section 5 holding in this case, and should thus be overturned. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary affirmances are binding on lower courts); *Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975) (same).

Since school boards need not obtain Section 5 clearance from the Attorney General regarding the subject matter of bond issue proposals *before* a referendum, it defies reason to hold that voters still may challenge the validity of such bond issues under Section 2, *after* the voters have approved the bonds. To perform their public responsibilities, local governmental authorities require some degree of certainty that their decisions are enforceable. The Court of Appeals' decision undercuts the Board's author-

ity to decide what bond issues to submit to the voters and exposes the Board to the uncertainty and delay of protracted litigation.

The cases cited above, taken together, teach that the Voting Rights Act only regulates election and voting procedures and does not reach substantive policy decisions of validly elected representatives. The Board's actions here have in no way deprived respondents of an equal opportunity to participate in the political process. Indeed, each voter had an opportunity to weigh the perceived benefits and detriments of the bond issue in its entirety and to cast an effective vote for or against it. If respondents disagreed with the comprehensive capital improvement plan that the Board formulated and the majority of the voters approved, they were entitled to voice their disagreement by voting in the referendum against the issuance of the bonds (and by voting in the next election of the board members), but they have no right to challenge the plan itself in a Voting Rights Act lawsuit.

Not only is this conclusion required under the precedents of this Court, but it is also fully consistent with the views already twice expressed by the Attorney General of the United States, as *amicus curiae*, in this very lawsuit. As this Court has stated, the views of the Attorney General regarding the scope of the Voting Rights Act are entitled to particular deference. *United States v. Board of Commissioners of Sheffield*, 435 U.S. 110, 131 (1978). The Board respectfully suggests that this Court again invite the Attorney General of the United States to file an *amicus curiae* brief addressing the issues raised by this petition for certiorari.

CONCLUSION

The Board respectfully requests that the Court grant a writ of certiorari because the Court of Appeals' decision improperly expands the reach of the Voting Rights Act, invades the legislative discretion of validly elected local governmental bodies and is contrary to controlling precedents of this Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 89-8556

DAVID LUCAS, WILLIE DAVIS, JR., CONNIE CATER, CORLIS MCKENZIE and RONNIE T. MILEY,
Plaintiffs-Appellants,

v.

JUDY TOWNSEND, in her official capacity as President of the Board of Education, Bibb County Board of Education, EMORY GREENE in his official capacity as Chairman of the Bibb County Board of Commissioners, Bibb County Board of Commissioners, A.B. "TONY" CALDWELL in his official capacity as Chairman of the Macon-Bibb County Board of Elections, Macon-Bibb County Board of Elections, BERNARD FLETCHER, in his official capacity as Supt., Macon-Bibb County Board of Elections,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

Aug. 9, 1990

Neil Bradley and Kathleen Wilde, American Civil Liberties Union Foundation, Inc., Atlanta, Ga., for plaintiffs-appellants.

W. Warren Plowden, Jr., Craig N. Cowart, and Edward S. Sell, Jr., Jones, Cork & Miller, Macon, Ga., and Della Wager Wells, King & Spalding, Atlanta, Ga., for defendants-appellees.

Before HATCHETT, Circuit Judge, RONEY* and FAIRCHILD**, Senior Circuit Judges.

HATCHETT, Circuit Judge:

In this voting rights case, we reverse the district court and hold that the form in which a referendum question is presented to voters may constitute a standard, practice, or procedure within the meaning of section 2 of the Voting Rights Act.

FACTS

In 1987, the Board of Public Education and Orphanage for Bibb County ("the Board") began planning a referendum requesting the voters of Bibb County to approve the issuance of general obligation bonds. The bonds were to provide funds to build a new high school and middle school, and to complete the air conditioning in all of the existing county schools. Initially, the Board planned to include all the projects in a single referendum scheduled for May, 1989. Subsequently, the Board voted to separately offer the air conditioning project in a referendum scheduled for March 8, 1988, the date of the presidential preference primary, popularly known as "Super Tuesday."

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Thomas E. Fairchild, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

The Board reversed this decision, changing the date for the referendum to May 31, 1988, and combining all the projects in a single referendum. The Board explains this change by pointing out that the Super Tuesday ballot also contained a referendum to raise the sales tax in Bibb County. According to the Board, voters might have been reluctant to pass two bond referendums; thus, both may have been defeated. Bibb County citizens, some of whom are appellants in this case, charged that the Board changed the date to avoid the heavy African-American voter turnout expected because of Jesse Jackson's name on the ballot. These citizens also charged that the Board combined the air conditioning project, initially scheduled as a separate referendum question on Super Tuesday, with the other projects to dilute the minority vote. Allegedly, African-American voters favored the air conditioning project, but did not favor new schools. These citizens complained that voters supporting one project were forced to vote in favor of other projects they did not support. The Board, composed of six white and four African-American members, split along racial lines in voting whether to combine the projects in one referendum, with the African-American members present voting against combining the projects in a single referendum.

The School Board sought preclearance from the Attorney General for the May 31st referendum pursuant to section 5 of the Voting Rights Act of 1965 ("the Act").[1] On May 25th, the Justice Department informed the Board that it could not preclear the referendum without further information.

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[1] Title 42 U.S.C. § 1973c requires preclearance by the Attorney General of changes in voting practices in certain, covered jurisdictions. In 1965, the Attorney General designated Georgia a covered jurisdiction under the Act. *See City of Rome v. United States*, 446 U.S. 156, 161, 100 S.Ct. 1548, 1553, 64 L.Ed.2d 119 (1980).

By regulation, the discretionary choice of a date for a special election such as a referendum is subject to the preclearance requirement. 28 C.F.R. § 51.17(b) (1987).

PROCEDURAL HISTORY

On May 27, 1988, David Lucas, Willie Davis, Jr., Connie Cater, Corlis McKenzie, and Ronnie T. Miley ("the appellants") filed this lawsuit in the Middle District of Georgia seeking declaratory and injunctive relief. The appellants sought to enforce the provisions of section 5 of the Act and to enjoin "deprivation under color of state law, statute, ordinance, regulation, custom or usage of the rights, privileges and immunities secured to plaintiffs by 42 U.S.C. §§ 1971, 1973, 1973c and 1983, and the first, thirteenth, fourteenth and fifteenth amendments of the Constitution of the United States. . . ." The appellants also filed a motion for a preliminary injunction. A three-judge court denied preliminary injunctive relief, holding that section 5 of the Act did not require preclearance of the date selected for a special referendum.[2] *Lucas v. Townsend*, 686 F.Supp. 902 (M.D.Ga.1988). The Supreme Court granted an injunction pending appeal on May 30, 1988. Because of state law notice requirements for holding a bond referendum, the postponement resulting from the injunction rendered the appeal moot, and it was dismissed.

On June 9, 1988, the Board approved a new bond referendum for $29 million which combined the building projects and the air conditioning project plus funding for a magnet school program at Northeast High School. Board members defeated an amendment to separate each of the four projects into individual questions on the ballot. The Board scheduled the referendum for November 8, 1988, the date of the general election, including the presidential election. The Attorney General granted preclearance for the new bond referendum under section 5.

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[2] "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." 42 U.S.C.A. § 1973c (West 1981).

In October, 1988, the appellants filed a second motion in the district court for injunctive relief claiming that the form of the referendum had not been precleared.[3] In an amicus brief, the Attorney General asserted that the decision to combine multiple projects in a single bond referendum was not a voting qualification, or a prerequisite to voting, or a standard, practice, or procedure with respect to voting as controlled by section 5 of the Act. A three-judge court denied the motion for a preliminary injunction under section 5, substantially adopting the Attorney General's position. *Lucas v. Townsend*, 698 F.Supp. 909 (M.D.Ga.1988). The three-judge court's order was not appealed. On November 8, 1988, the voters of Bibb County approved the bond issue by 50.8-percent of the vote.

On March 7, 1989, the three-judge court entered judgment for the School Board on the section 5 claims. *Lucas v. Townsend*, 732 F.Supp. 1581 (M.D.Ga.1989). On June 7, 1989, a single-judge district court denied the appellants' claim based on section 2 of the Act. The district court ruled that the Board's exercise of discretion in combining multiple projects in a single referendum rather than submitting them as four separate questions did not constitute a standard, practice, or procedure under section 2. *Lucas v. Townsend*, 714 F.Supp. 525 (M.D.Ga. 1989).

On January 22, 1990 the Supreme Court summarily affirmed the judgment of the three-judge court denying relief for the section 5 claims. *Lucas v. Townsend*, —— U.S. ——, 110 S.Ct. 858, 107 L.Ed.2d 943 (1990).

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[3] "Any change affecting the . . . *methods* for offering issues and propositions for approval by referendum" is subject to preclearance. 28 C.F.R. § 51.13(j) (1987) (emphasis added).

CONTENTIONS OF THE PARTIES

The appellants contend that the Supreme Court's summary affirmance of the three-judge court's denial of relief under section 5 does not constitute binding precedent regarding the legal issues presented in this section 2 claim. According to the appellants, the form and timing of the referendum constitutes a standard, practice, or procedure affecting voting within the meaning of section 2 of the Voting Rights Act. They further contend that the form of the referendum was intended to or had the effect of diluting the minority vote in violation of section 2 of the Act and in violation of the first, thirteenth, fourteenth, and fifteenth amendments.

The Board contends that the Supreme Court's summary affirmance is binding precedent which controls the outcome of this appeal. The Board also contends that the form of the referendum question on the ballot is not a voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting pursuant to the Act. According to the Board, even if section 2 is applicable, the political processes leading to the formulation of the referendum question were equally open to African-Americans, and therefore, section 2 was not violated. All other constitutional claims were waived, the Board argues, through the appellants' failure to raise these claims in the pretrial conference on March 2, 1989, or in subsequent documents submitted to the district court.

ISSUES

The issues are (1) whether the Supreme Court's summary affirmance of the denial of relief under section 5 constitutes binding precedent in this section 2 appeal, (2) whether the form of the referendum question is a standard, practice, or procedure within the meaning of section 2 of the Voting Rights Act, and (3) whether section 2 of the Act was violated in this case.

DISCUSSION

I. Summary Affirmance

When the Supreme Court summarily affirms without opinion, it affirms the judgment, but not necessarily the court's reasoning supporting the judgment. *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240, 53 L.Ed.2d 199 (1977). Any question which it clearly decides in affirming the judgment is binding on all other courts faced with the same issue. *Hicks v. Miranda*, 422 U.S. 332, 344-45, 95 S.Ct. 2281, 2289-90, 45 L.Ed.2d 223 (1975). Thus, the threshold question is whether the Supreme Court necessarily decided that the form of a bond referendum question is not "a standard, practice, or procedure affecting voting" pursuant to section 5.

The three-judge court denied relief on the merits of the section 5 claims, citing the same reasons it gave earlier in its opinion denying preliminary injunctive relief under section 5.[4] In that opinion, the court gave the following two reasons for its decision:

> First, Georgia school boards before November 1, 1964, were authorized to and had exercised their

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[4] The parties having stated at a pretrial conference held on March 2, 1989, before the originating judge that they do not desire to present further evidence or briefs on the issues required to be heard by this 28 U.S.C. § 2284 court of three judges, this court of three judges, for the reasons set forth in its order of November 2, 1988, [*Lucas v. Townsend*, 698 F.Supp. 909 (M.D.Ga.1988)] does hereby declare and adjudge that the decision of the defendant Bibb County Board of Education to submit a single twenty-nine million dollar bond issue by referendum to the voters of Bibb County, Georgia[,] rather than to submit four separate bond issues for the four categories of school improvements to be paid for by said bond issues, is not encompassed by Section Five of the Voting Rights Act of 1965, and therefore, did not have to be submitted to the Attorney General of the United States for Section Five preclearance.

Lucas v. Townsend, 732 F.Supp. 1581, 1581 (M.D.Ga.1989).

> discretion in formulating questions for bond referendums. The exercise of discretion by the Bibb County School Board was thus no change. Second, the form or structure of a question on a bond referendum is not a standard, practice, or procedure affecting voting. The discretionary decision to submit one or more questions to the electorate is one properly left to the political process.

Lucas v. Townsend, 698 F.Supp. 909, 912 (M.D.Ga. 1988).

The School Board contends that the Supreme Court's summary affirmance of this ruling is binding precedent on whether the form of a referendum is a standard, practice, or procedure pursuant to section 2.[5] The appellants argue that the two alternative reasons for the Supreme Court's affirmance prevent it from controlling this section 2 case. Under the first basis for its affirmance, the Court may have simply agreed that the exercise of discretion in formulating questions for bond referendums does not constitute a "change" under section 5. Section 5, requiring preclearance by the Attorney General, only applies to proposed changes in voting procedures enacted after November 1, 1964. 42 U.S.C.A. § 1973c (West 1981); *see Lucas v. Townsend*, 698 F.Supp. at 911. If the Supreme Court agreed with this rationale, it did not have to reach the second basis for the opinion,

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[5] Section 5 of the Voting Rights Act of 1965, codified at 42 U.S.C. § 1973c, requires preclearance by the Attorney General for changes of "any voting qualification or prerequisite to voting, or *standard, practice, or procedure* with respect to voting. . . ." 42 U.S.C.A. § 1973c (West 1981) (emphasis added).

Section 2 of the Voting Rights Act of 1965, codified at 42 U.S.C. § 1973(a), provides that "[n]o voting qualification or prerequisite to voting or *standard, practice, or procedure* shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race. . . ." 42 U.S.C.A. § 1973(a) (West Supp. 1990) (emphasis added).

whether the form of a bond referendum question is a standard, practice, or procedure affecting voting.

We agree with the appellants that because two reasons exist for the Supreme Court's affirmance, it did not *necessarily* decide the issue of whether the form of a bond referendum question is a standard, practice, or procedure affecting voting. The Supreme Court may have agreed with the three-judge court that the decision to combine multiple projects in a bond referendum did not constitute a change under section 5. Georgia law allows school boards to combine more than one project in a referendum. *See Miles v. State*, 96 Ga.App. 610, 614, 101 S.E.2d 173, 176 (1957) (bond referendum combining several school funding projects held to constitute "one proposition" as required by state statute); *see also* Ga.Code Ann. § 36-82-1 (Michie Supp.1989). Therefore, we hold that the Supreme Court's summary affirmance does not constitute binding precedent on the issue of whether the form of a referendum is a standard, practice, or procedure within the meaning of section 2.[6]

II. "Standard, Practice, or Procedure" Under Section 2

Section 2 of the Voting Rights Act of 1965 provides that

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantee set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

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[6] Because we decide that the Supreme Court did not necessarily reach this issue, we need not decide whether the phrase "standard, practice, or procedure" has the same meaning in section 2 and section 5.

42 U.S.C.A. § 1973(a) (West Supp.1990). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 2764, 92 L.Ed.2d 25 (1986). All citizens enjoy the right to a properly weighted and counted vote encompassing both "votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." 42 U.S.C.A. § 1973*l*(c)(1) (West 1981). Thus, bond referendums, which are a form of proposition, fall within the express language of the Act. The question remaining, as a matter of first impression, is whether combining multiple bond projects in a single referendum constitutes a standard, practice, or procedure which has the potential of resulting in the denial or abridgement of the right to vote on account of race.

The phrase "standard, practice, or procedure" appears in section 2 and section 5 of the Act. In the following discussion, we examine the Supreme Court's interpretation of this phrase in both sections to determine its scope. In *Allen v. State Board of Elections*, 393 U.S. 544, 567, 89 S.Ct. 817, 832, 22 L.Ed.2d 1 (1969), the Court held that the phrase must be given the "broadest possible scope." Based on the legislative history of Congress' intent, the Court concluded that "the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'" *Allen*, 393 U.S. 544, 565-66, 89 S.Ct. 817, 832 (citations omitted). In *Allen*, the Court held that a change from district to at-large voting for county supervisors constituted a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of section 5. The Court also held that the decision to make certain offices

appointive instead of elective fell within the meaning of section 5.

In *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978), the Court held that a local school board's rule regarding leave without pay for employees while they sought elected office and while they served in that capacity was "a standard, practice, or procedure" affecting voting within the meaning of section 5. The Court reasoned that the rule was not a neutral personnel practice governing all forms of absenteeism, but rather a type of filing fee. "By imposing substantial economic disincentives on employees who wished to seek elective office, the rule burdens entry into elective campaigns and, concomitantly limits the choices available to Dougherty County voters." 439 U.S. at 40, 99 S.Ct. at 373.

In response to the Court's ruling, the local school board eliminated the policy requiring leave without pay for employees seeking political office, instituting instead a neutral employee policy limiting leave without pay to case-by-case consideration. The Court subsequently affirmed the three-judge court's holding that individual personnel decisions regarding an employee's request for leave without pay to serve in an elected capacity was *not* "a standard, practice, or procedure with respect to voting." *White v. Dougherty County Board of Education*, 579 F. Supp. 1480 (M.D.Ga.1984), *aff'd*, 470 U.S. 1067, 105 S.Ct. 1824, 85 L.Ed.2d 125 (1985). *Cf. NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178, 105 S.Ct. 1128, 1135, 84 L.Ed.2d 124 (1985) (change need not be likely to be repeated; "Voting Rights Act reaches changes that affect even a single election.").

While section 5 requires preclearance for changes in voting practices in covered jurisdictions, section 2 forbids practices which abridge the right to vote on account of race in any jurisdiction. The right to vote may be

abridged through the dilution of voting strength. *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506 (1964). Challenges to at-large voting schemes consistently have been held to fall within the meaning of section 2 because of their potential for diluting the effectiveness of the minority vote. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *Solomon v. Liberty County, Florida*, 899 F.2d 1012 (11th Cir.1990); *United States v. Dallas County Commission*, 850 F.2d 1433 (11th Cir.1988). The courts have also held that a "standard, practice, or procedure" within the meaning of section 2 can include the appointment of poll officials and the selection of polling places. *See United States v. Marengo County Commission*, 731 F.2d 1546, 1552-53 (11th Cir.1984) (appointment of poll officials); *Perkins v. Matthews*, 400 U.S. 379, 387, 91 S.Ct. 431, 436, 27 L.Ed.2d 476 (1971) (location of polling place). In *Perkins*, the Court held that locating polling places distant from African-American communities or at places calculated to intimidate them from entering was a practice or procedure which violated the Act. "The abstract right to vote means little unless the right becomes a reality at the polling place on election day." *Perkins v. Matthews*, 400 U.S. at 387, 91 S.Ct. at 436.

We begin our analysis by noting that the views of the Attorney General regarding the scope of section 5 of the Act are entitled to deference. *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. at 39, 99 S.Ct. at 372. We do not afford the Attorney General's interpretation of section 5 the same deference in resolving claims under section 2, however, because that section does not involve the Attorney General. In the amicus brief submitted on behalf of the United States to the three-judge court, the Attorney General stated that "[i]t is unquestioned that the 'method of offering issues and propositions for approval by referendum' is . . . a standard, practice, or procedure that, if changed, is subject

to section 5 review." (Citing 28 C.F.R. § 51.13(j).) The Attorney General, nevertheless, stated the following reasons for not requiring preclearance for the Board's choice of how to frame the referendum:

> Here, the facts of the record would tend to suggest that the defendants' discretionary decision to present the voters with a single vote on the entire bond project is not the kind of change subject to preclearance. Selecting a number of projects to be financed under one bonding authority would seem to be a normal legislative decision unrelated to the process of holding elections. It is essentially the same kind of determination as the amount of bonded indebtedness required for a project, the interest rate the Board is willing to pay, or the term of the bonds.

We cannot agree that the decision to group multiple projects into one referendum is analogous to the decision of how much money to spend on a project, or what interest rate should be paid on the bonds. How the Board presents projects to the voters, whether as single-issue or multiple-issue referendums, becomes a political decision with the potential for diluting or submerging the minority vote as prohibited by section 2. As the Attorney General acknowledges, the Voting Rights Act is designed to assure equal opportunity for the minority to express its political will whether in the election of the candidate of their choice or in voting for the proposition of their choice. By combining projects in one referendum, the Board forced minority voters supporting one project to either vote in favor of other projects they might not support, to abstain from voting, or to vote against the project they supported. Their political will to defeat certain propositions is effectively diluted or submerged by the combination of multiple projects in a single referendum. *See Rea v. City of Lafayette*, 130 Ga. 771, 61 S.E. 707, 708 (1908) ("[t]o present [two] propositions in a single submission, thus rendering the success of one

dependent upon the success of the other, or the defeat of one on the defeat of the other, is clearly unfair to the voters. . . .").

The district court concluded that the Board's decision to group all four bond projects into a single referendum was not "a standard, practice, or procedure" pursuant to section 2. The district court reasoned that the Board's discretionary, deliberative process did not address the right to vote as protected by the Act.

> [T]his court determines that the exercise of discretion by validly elected local board officials in determining the number of questions to be submitted to the electorate for its approval or disapproval at the ballot box is not a standard, practice, or procedure. Alternatively, the court finds that *even if such exercise of discretion was a standard, practice, or procedure, such practice does not affect voting.* The manner in which the proposal was structured had and has absolutely no bearing upon the qualification of any individual to vote, the ability of any individual to register to vote, the opportunity of any individual to cast his or her vote, or the manner in which any individual's vote was tabulated.

Lucas v. Townsend, 714 F.Supp. 525, 534 (M.D.Ga.1989) (emphasis added).

Although this practice may not be the kind of *change* subject to preclearance under section 5, we hold that it is "a standard, practice, or procedure" that has the potential for abridgement of the right to vote on account of race. Minority communities have the right to vote for or against the propositions of their choice just as they have the right to a fully effective vote to elect candidates of their choice. The practice of combining separable referendum issues into a single question may work to abridge minority voting rights as certainly as the policy concerning leaves of absence for employees running for public

office, the appointment of polling officials, and the location of the polls. In the proper case, this practice could dilute a minority vote as effectively as anti-single shot voting procedures and straight ticket voting requirements. *See City of Rome v. United States*, 466 U.S. 156, 184-85 n. 19, 21, 100 S.Ct. 1548, 1565 n. 19, 21, 64 L.Ed. 2d 119 (1980) (anti-single shot voting practices described); *Dunston v. Scott*, 336 F.Supp. 206, 211 (E.D. N.C.1972) (anti-single shot law requires voter to vote for all available seats even though voter would prefer to vote for fewer seats); *Hendon v. North Carolina State Board of Elections*, 710 F.2d 177, 180 (4th Cir.1983) (straight ticket vote counting that did not count split ticket votes unconstitutional).

Our holdings do not have any far reaching impact on the manner in which public bodies in Georgia may offer propositions to the voters. Section 5 is not affected by our holding. Since Georgia law presently allows multiple propositions to be presented in a single referendum, continuing this practice will not constitute a change; thus, the Attorney General will not be required to preclear the proposition. *See Lucas v. Townsend*, 732 F.Supp. 1581 (M.D.Ga.1989), *aff'd*, —— U.S. ——, 110 S.Ct. 858, 107 L.Ed.2d 943 (1990). As to the effect of our holding on section 2, multiple propositions presented in a single referendum will be subject to litigation; but, so are all referendum propositions that allegedly discriminate against minorities.

III. The Violation of Section 2

We do not reach the merits of the appellants' section 2 claim because the district court did not rule on the "results" aspect of this case. Therefore, we remand this case to the district court for the determination of whether section 2 has been violated.[7]

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[7] On remand, the district court should determine whether the appellants' failure to present the constitutional issues in the March

CONCLUSION

We hold that the Supreme Court's summary affirmance on the appellants' section 5 claim does not constitute binding precedent as to the issue in this case. We further hold that the form or structure of a referendum question is "a standard, practice, or procedure" within the meaning of section 2 of the Voting Rights Act of 1965. We remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

RONEY, Senior Circuit Judge, dissenting:

I respectfully dissent for the reasons stated in the opinion of the district court, which I would affirm. *Lucas v. Townsend*, 714 F.Supp. 525 (M.D.Ga.1989).

2, 1989 pre-trial conference resulted in a waiver of those issues. We note that the appellants' proposed Pre-trial Order filed February 28, 1989, listed claims based on the first, thirteenth, fourteenth, and fifteenth amendments.

APPENDIX B

UNITED STATES DISTRICT COURT
M.D. GEORGIA
MACON DIVISION

Civ. A. No. 88-166-1-MAC (WDO)

DAVID LUCAS, *et al.*,
Plaintiffs,

v.

JUDY TOWNSEND, *et al.*,
Defendants.

June 7, 1989

Neil Bradley, Atlanta, Ga., for plaintiffs.

W. Warren Plowden, Ed. S. Sell, Jr., Macon, Ga., and Della Wager Wells, Atlanta, Ga., for defendants.

ORDER

OWENS, Chief Judge.

As a part of the general presidential election conducted on November 8, 1988, the voters of Bibb County, Georgia approved a twenty-nine million dollar ($29,000,000.00) bond issue destined to pay for the following improvements in the Bibb County school system:

(1) air conditioning existing schools;

(2) constructing a new north-west Bibb County high school with a proposed approximate ratio of 50% white students and 50% black students; and

(3) renovating Northeast High School for its use as a magnet high school.

Both preceding and after the November 8th general election, plaintiffs failed to convince a three-judge district court, convened in accordance with 28 U.S.C. § 2284(b), that Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, requires approval by the Attorney General of the United States of the county commission's and county school board's decision to submit the twenty-nine million dollar bond issue to the electorate as a single question rather than to submit to the voters each of the three component parts of the proposal for their separate approval or disapproval. *See Lucas v. Townsend*, 698 F.Supp. 909 (M.D.Ga.1988)[1]; *Lucas v. Townsend*, Slip. Op. No. 89-166-1-MAC (WDO) (May 16, 1989).

Having failed to prevail on their Section 5 claim, plaintiffs now seek to persuade this court of one judge that, pursuant to Section 2 of the Voting Rights Act, the same conduct found not to be a standard, practice, or procedure affecting voting by a three-judge court has suddenly been transformed by Section 2 into such a standard, practice, or procedure. Arguing that Section 2 coverage is broader than coverage under Section 5, plaintiffs contend that the conduct of defendants in this case, that is, the board's exercise of its discretion in combining the school improvement proposals into one question rather than into several questions, is a standard, practice, or procedure which has

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[1] Section 5 of the Voting Rights Act requires that certain "changes affecting voting" be pre-cleared by the Attorney General of the United States prior to their implementation. The three-judge panel held that the Bibb County school board's exercise of its discretion in formulating questions for bond referendums was not a change affecting voting. Further, the court held that "the form or structure of a question on a bond referendum is not a standard, practice or procedure affecting voting. The discretionary decision to submit one or more questions to the electorate is one properly left to the political process." *Lucas*, 698 F.Supp. at 912.

prevented individuals in the black community from casting an effective vote.[2]

Discussion

Background

O.C.G.A. § 20-2-430 enables county school boards to seek the issuance of bonds upon their determining that

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[2] Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973*l*(c)(1) defines "vote" or "voting" for purposes of sections 2 and 5. It reads as follows:

> (c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

See also 28 C.F.R. § 51.2.

the incurrence of such debt is in the best interests of education in the county. That statue provides that the election shall be called and held in the manner prescribed by O.C.G.A. § 36-82-1, a section which describes in detail the notice and other requirements applicable to such issues. In ruling upon challenges to elections held pursuant to the forerunners to these and other statutes, Georgia courts have established the following principle:

> If it can be said that the proposed improvements are not naturally related or connected, then it is clear that separate submissions are required; if, on the other hand, the several parts of the project are plainly so related that, united, they form in fact but one rounded whole, it is equally clear that they may be grouped together and submitted as one proposition.

Miles v. State of Georgia, 96 Ga.App. 610, 614, 101 S.E.2d 173, 176 (1957) (citations omitted); *see Berrie v. State*, 119 Ga.App. 148, 166 S.E.2d 631 (1969); *compare Rea v. City of LaFayette*, 130 Ga. 771, 772, 61 S.E. 707, 708, (1908) ("two or more *separate and distinct propositions* cannot be combined into one and submitted to the voters of a county or a municipality as a single question, so as to have one expression of the voter answer all of them.") (emphasis added).

The bond issues submitted to the electorate in both *Miles* and *Berrie* each involved numerous projects for improving the respective county school systems as a whole.[3]

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[3] For example, the bond issue in dispute in *Miles* involved a proposal to finance improvements in the Bacon County, Georgia school system, and the use of the funds derived from the sale of the bonds was explained as follows:

> [The funds derived from the sale of the bonds would be] for the purpose of providing funds to build, construct and equip new educational facilities such as school buildings, libraries, auditoriums, cafeterias, gymnasiums, athletic fields and buildings, and structures useful in connection therewith, adding to,

Clearly, the bond issue submitted to the voters of Bibb County on November 8th involved various proposals for the improvement of the Bibb County school system plainly so related that, united, they form in fact but one related whole. Thus, pursuant to Georgia law, those proposals may be grouped together and submitted as one proposition. *See Miles, supra.*

Applicable Law

With the above discussion as background, the court now considers plaintiffs' Section 2 allegations. "The essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 2764-65, 92 L.Ed.2d 25, 44 (1986). In evaluating a plaintiff's Section 2 claim, a court must first determine whether the challenged conduct or activity is of a type encompassed by the Voting Rights Act, that is, whether the challenged conduct constitutes a standard, practice, or procedure which affects voting.[4] *See gen-*

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improving and equipping existing properties and facilities of the Bacon County School System and acquiring the necessary property therefor and paying expenses incident thereto.

Miles, 96 Ga.App. at 613, 101 S.E.2d at 176.

[4] Neither the statutes (sections 1973 and 1973c) nor the regulations promulgated pursuant to section 1973c, *see* 28 C.F.R. §§ 51.1, *et seq.*, defines a standard, practice, or procedure as those terms are employed in section 1973. *See Dougherty County No. 1*, 439 U.S. at 37, 99 S.Ct. at 371-72, 58 L.E.2d at 277. 28 C.F.R. § 51.13 enumerates examples of "changes affecting voting," most of which relate to practices or procedures pertaining to (1) qualifications, eligibility, or registration for either voting or running for office, (2) boundaries for representative districts, voting precincts or voting units, (3) locations of polling places, and (4) methods of determining the outcome of elections. Only section 51.13(j), which concerns changes "affecting the necessity of or methods for offering issues and propositions for approval by referendum," appears at all relevant to the matter before this court. This court has been unable

erally, Dougherty County, Georgia, Bd. of Education v. White ("Dougherty County No. 1"), 439 U.S. 32, 99

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to discover, and the parties in their pleadings have failed to include, cases interpreting this section.

However, as illustrative of the types of conduct or activities which courts have found to constitute standards, practices, or procedures with respect to voting, the court includes the following summary of "changes" which the Supreme Court has found to be covered under Section 5 of the Voting Rights Act. This summary is contained in *NAACP, Dekalb County Chapter v. State of Georgia*, 494 F.Supp. 668, 678 (N.D.Ga. 1980).

> —a change from district to at-large voting for county supervisors, *Allen v. State Board of Elections, supra*, 393 U.S. at 569, 89 S.Ct. at 833-34;
>
> —a change from electing to appointing an important county officer in certain counties, *Allen v. State Board of Elections, supra*, 393 U.S. at 569-70, 89 S.Ct. at 834;
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> —an amendment to balloting procedure which provides that "no person who has voted in a primary election may thereafter be placed on the ballot as an independent condidate in the general election," *Allen v. State Board of Elections, supra*, 393 U.S. at 570, 89 S.Ct. at 834;
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> —a new procedure for casting write-in votes, *Allen v. State Board of Elections, supra*, 393 U.S. at 570, 89 S.Ct. at 834;
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> —a change in the location of polling places, *Perkins v. Matthews, supra*, 400 U.S. at 387, 91 S.Ct. at 436;
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> —municipal annexations, *Perkins v. Matthews, supra*, 400 U.S. at 388, 91 S.Ct. at 437;
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> —the change from ward to at-large elections of city aldermen, *Perkins v. Matthews, supra*, 400 U.S. at 394, 91 S.Ct. at 439-40;
>
> —a state statute which staggered the terms of the three members of a county Board of Commissioners of Roads and Revenues, *Berry v. Doles*, 438 U.S. 190, 191, 98 S.Ct. 2692, 2694, 57 L.Ed.2d 693 (1978);
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> —a city's decision to change from an aldermanic system of government to a system in which councilmen are elected at large, *United States v. Board of Commissioners of Sheffield, Alabama, supra*, 435 U.S. at 137-38, 98 S.Ct. at 982-83; and
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> —a rule by a county board of education requiring employees to take unpaid leaves of absence while campaigning for public office, *Dougherty County, Georgia Board of Education v. White, supra*, 439 U.S. at 47, 99 S.Ct. at 377.

S.Ct. 368, 58 L.Ed.2d 269 (1978) (holding that a local school board's rule regarding leave without pay for employees desiring to seek elected office and to serve in that capacity was a standard, practice, or procedure affecting voting); *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1989) (holding that the Voting Rights Act does not reach the activities of private citizens in their petition efforts to place a referendum on the ballot); *see also White v. Dougherty County Bd. of Education* ("*Dougherty County No. 2*"), 579 F.Supp. 1480 (M.D.Ga.1984), *aff'd*, 470 U.S. 1067, 105 S.Ct. 1824, 85 L.Ed.2d 125 (1985) (holding that individual personnel decisions regarding employee's request for leave without pay to serve in elected capacity was not a standard, practice, or procedure with respect to voting). In considering whether the conduct alleged in this case is a standard, practice, or procedure with respect to voting, the court is cognizant both that the phrase "standard, practice, or procedure" must be given the broadest scope possible, *Allen v. Board of Elections*, 393 U.S. 544, 566-67, 89 S.Ct. 817, 832-33, 22 L.Ed.2d 1, 17-18 (1969), and that " 'voting' includes 'all action necessary to make a vote effective.' " *Id.* at 565-66, 89 S.Ct. at 832, 22 L.Ed.2d at 17, citing 79 Stat. 445, 42 U.S.C. § 1973*l*(c)(1).

Because of an absence of authority on the subject, *see supra* note 4, and because the views of the Attorney General regarding the scope of the Voting Rights Act are entitled to particular deference, *see Dougherty County No. 1*, 439 U.S. at 39, 99 S.Ct. at 372-73, 58 L.Ed.2d at 278, the three-judge panel, during the prior Section 5 litigation, invited the United States to submit a brief as *amicus curiae*. Therein, commenting upon 28 C.F.R. § 51.13(j), the United States stated that "[i]t is unquestioned that the 'method of offering issues and propositions for approval by referendum' is such a standard, practice or procedure that, if changed, is subject to Section 5 review." Brief for the United States as *Amicus Curiae*

("*Amicus*" Brief), pp. 13-14, citing 28 C.F.R. § 51.13(j). However, the United States continued as follows:

> Here, the facts of record would tend to suggest that the defendants' discretionary decision to present the voters with a single vote on the entire bond project is not the kind of change subject to preclearance. *Selecting a number of projects to be financed under one bonding authority would seem to be a normal legislative decision unrelated to the process of holding elections.* It is essentially the same kind of determination as the amount of bonded indebtedness required for a project, the interest rate the board is willing to pay or the term of the bonds.

Amicus Brief, pp. 16-17 (emphasis added).

The somewhat inconsistent statements made by the Attorney General evidence both the novelty of plaintiffs' argument and the difficulty of the question presented. However, upon consideration, this court finds implicit in the Attorney General's comments the idea that the "methods" brought within the meaning of 28 C.F.R. § 51.13(j) are not those discretionary decisions made by properly elected legislative officials "in the best interests of education"; instead, the regulation refers to those barriers, be they subtle or obvious, which obstruct the paths leading to the registration of voters, the casting of votes, the tabulation of votes and the requirements for election or passage, *i.e.*, approval by majority vote, or by plurality vote, or by a two-thirds margin.

The general idea stated just above finds support in the legislative history developed in regard to the 1982 amendments to the Voting Rights Act. *See generally*, Senate Rep. No. 97-417, 97th Congress, 2nd Session, pp. 1-43, *reprinted in* 1982 U.S.Code Cong. & Ad.News, pp. 177-221 (citations hereafter will be to pages in 1982 U.S. Code Cong. & Ad.News). The original intent of Section 2 of the Voting Rights Act of 1965 was to ban " 'any

kind of practice . . . if its purpose or effect was to deny or abridge the right to vote on account of race or color.' " 1982 U.S.Code Cong. & Ad.News, p. 194 (footnote omitted), quoting Attorney General Katzenbach. "[S]ection 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy." *Id.* at 206. Congress noted that the vast majority of Section 2 cases have "dealt with electoral system features such as at-large elections, majority vote requirements and districting plans." *Id.* at 207; *see e.g. Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976).[5]

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[5] Congress emphasized, however, that "section 2 remains the major statutory prohibition of all voting rights discrimination. It also prohibits practices which, while episodic and not involving permanent structural barriers, results in the denial of equal access to any phase of the electoral process for minority group members." 1982 U.S.Code Cong. & Ad.News, p. 207.

Footnote 119 of the Senate Report, in illustration of the scope of Section 2, states as follows:

> This aspect of the statute's scope is illustrated by a variety of Section 2 cases involving such episodic discrimination. For example, a violation could be proven by showing that the election officials made absentee ballots available to white citizens without a corresponding opportunity being given to minority citizens. *See Brown v. Post*, 279 F.Supp. 60, 63-64 (W.D.La. 1968). Likewise, purging of voters could produce a discriminatory result if fair procedures were not followed, *Toney v. White*, 488 F.2d 310 (5th Cir. 1973), or if the need for a purge were not shown or if opportunities for re-registration were unduly limited. Administration of an election could likewise have a discriminatory result if, for example, the information provided to voters substantially misled them in a discrim-

Each of the cases mentioned, discussed, or noted above addresses a standard, practice, or procedure which clearly impacts a minority individual's access to and participation in the electoral process. Those cases must be contrasted with the alleged standards, practices, or procedures in *Dougherty County No. 2, supra; Delgado v. Smith, supra; Burger v. Judge*, 364 F.Supp. 504 (D. Mont.1973), *aff'd*, 414 U.S. 1058, 94 S.Ct. 563, 38 L.Ed.2d 465 (1973); and *Kohler v. Tugwell*, 292 F.Supp. 978 (E.D.La.1968), *aff'd* 393 U.S. 531, 89 S.Ct. 879, 21 L.Ed.2d 755 (1969). In *Dougherty County No. 2*, though plaintiff John White's claim was based upon Section 5, the three-judge panel's decision hinged upon whether certain actions taken by the school board constituted a standard, practice, or procedure.[6] The actions referred to involved various decisions made by the Dougherty County

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inatory way. *United States v. Post*, 297 F.Supp. 46, 50-51 (W.D.La.1969).

1982 U.S.Code Cong. & Ad.News, p. 208.

Two additional cases further illuminate the scope of Section 2. In *Brown v. Dean*, 555 F.Supp. 502 (D.R.I.1982), the court held that "the location and accessibility of a polling place have a direct effect on a person's ability to exercise his franchise." *Id.* at 505, citing *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971). The court found a violation of Section 2 and ordered the polling place relocated. In *Miss. State Chapter Operation PUSH v. Allain*, 674 F.Supp. 1245 (N.D.Miss.1987), the court identified the following voter registration laws as practices in violation of Section 2: (1) the state's failure to make certain amendments to Mississippi's election laws retroactive to that category of voters who had registered with a county registrar prior to August 3, 1984; (2) the state's failure to mandate deputization of all municipal clerks as deputy county registrars; and (3) the state's failure to require satellite registration on a uniform statewide basis, thus hindering the ability of minority members to participate in the political process. *Id.* at 1268.

[6] The court noted as follows: "Assuming that this court finds that any such standard, practice or procedure was adopted, the second question to be answered is whether or not it is 'with respect to voting. . . .'" *Dougherty County No. 2*, 579 F.Supp. at 1490.

school board either authorizing or refusing to authorize leave without pay for school employees who wished to campaign for and serve in certain elected positions. In one instance, the panel determined that the school board's decision "did not constitute a 'standard, practice or procedure' pertaining to employee absence. It was nothing more than an individual personnel decision." *Id.* at 1491-92 (footnotes omitted). A second decision by the school board was found not to be a standard, practice, or procedure because in light of its conditional nature it failed to establish "a precedent on which the affected employees and others may rely. . . ." *Id.* at 1492. Finally, the three-judge court found that, despite the defendant school board's own characterization of its decision as a policy on political leave, "the board in reality decided not to allow its employees who are elected to public office greater time away from the job than they and all other employees are otherwise allowed." *Id.*[7]

In *Delgado v. Smith*, *supra*, the Eleventh Circuit considered whether citizen initiative petitions come within the Voting Rights Act. The court stated that "[t]here is no question that the sole purpose of [the Voting Rights Act] was to ensure the integrity of the registration and voting process by eradicating barriers which had previously prevented blacks from voting." *Delgado*, 861 F.2d

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[7] The court summarized as follows:

> Viewed from every angle and in the brightest light of the Supreme Court's broad interpretations of the words "standard, practice, and procedure," this board's refusal to alter its neutral personnel policies to accommodate this employee elected office holder does not possibly constitute a Section 5 "standard, practice, or procedure."
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> * * * *
>
> There having been no "standard, practice, or procedure" enacted or sought to be administered, it is unnecessary to consider whether or not the conduct of the defendant board was "with respect to voting."

Id. at 1493 (footnote omitted).

at 1492. The court cited with approval a decision which found the petition process too far removed from the voting booth to fall under the Act. *Id.* at 1493, citing *Zaldivar v. City of Los Angeles*, 590 F.Supp. 852 (C.D. Cal.1984), *rev'd on other grounds*, 780 F.2d 823 (9th Cir. 1986). The Eleventh Circuit panel concluded that "the history of the Act, the stated intention of Congress, and the relevant case law persuade us that the Voting Rights Act could not properly be applied to the case before us." *Id.* at 1493.

In *Burger v. Judge, supra*, a three-judge panel considered the merits of plaintiffs' contentions that the citizens of Montana, in voting on four propositions submitted to the electorate by a Constitutional Convention, had been misled as to the effects of their votes by (1) the official ballot, (2) an official publication mailed to all voters, (3) a newspaper supplement, (4) an analysis prepared by the Constitutional Convention Commission, (5) the debate during the Constitutional Convention, and (6) a particular state statute. *Burger*, 364 F.Supp. at 508-09. The court, after a discussion of plaintiffs' arguments, stated that "[i]n any event, it is clear that all electors who were in fact opposed to the proposed constitution could have expressed their disapproval by voting against it." Continuing, the court stated as follows:

> This is not a case where any electors were deprived of a right to vote or where there was any debasement or dilution in their votes. Nor is it a case where the voters were misled with respect to the content or meaning of any of the issues submitted to them. The 7,302 electors clearly had a right and opportunity to vote on the proposed constitution and in fact were urged to do so.
>
> If, under these circumstances, any electors were in fact misled, they were simply mistaken as to the effect of their absention from voting and not deprived of any right or opportunity to vote in viola-

> tion of Article IV, Section 4 of the Constitution of the United States, the Fourteenth Amendment to the Constitution, or the Voting Rights Act of 1965 (42 U.S.C. § 1973).

Id. at 511-12 (footnotes omitted).

Finally, in *Kohler v. Tugwell, supra*,[8] a three-judge panel heard plaintiffs' claim that "the designation of the amendment as it appeared on the state ballot misled voters. Hence, they contend that those who voted in favor of the enactment were deprived of their right to vote. . . ." *Kohler*, 292 F.Supp. at 979. The panel agreed with plaintiffs that the amendment was phrased in a manner "so turgid that it would be difficult to say that any ballot designation could describe it accurately." *Id.* at 980. Quoting *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S.Ct. 1362, 1377, 12 L.Ed.2d 506, 523 (1964), the court noted that "the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections." *Kohler*, 292 F.Supp. at 981. The *Kohler* panel went on to state as follows:

> However, a federal court must not interfere with the internal affairs of a State unless it is necessary to do so to protect those rights guaranteed every citizen by the Federal Constitution. The procedure followed by Louisiana does not deprive the plaintiffs of Due Process for it is sufficient that Louisiana's voters were informed by the ballot of the subject of the amendment, were given a fair opportunity by

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[8] The plaintiffs in *Kohler* were proceeding under the United States Constitution, Article 4 § 4 and Amendment 14. The Voting Rights Act was not at issue in the case. However, the discussion in *Kohler* sheds some light on the matter before this court. Additionally, the court notes that the Fourteenth Amendment to the Constitution of the United States is one of the sources of the Voting Rights Act. *See United States v. Marengo County Commission*, 731 F.2d 1546, 1555 (11th Cir.1984), *appeal dismissed, cert. denied*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 311 (1984).

> publication to consider its full text, and were not deceived by the ballot's words.

Id. (footnote omitted).

Analysis

Quite clearly, the issues raised by plaintiffs in the case before this court are not identical to those issues discussed in the cases above. However, the extensive examination of the relevant statutory, regulatory and case law has convinced this court that the conduct attacked by plaintiffs in this case is not a standard, practice, or procedure as those terms are understood. First, it seems clear to this court that the Voting Rights Act addresses the right to vote; it does not address the deliberative process of local or state boards. Second, plaintiffs have presented no evidence to this court of any policy or mathematical formula by which or pursuant to which the school board of Bibb County arrives at the manner in which any particular proposal decided to be in the best interests of education should be submitted to the electorate. Instead, like the situation presented in *Dougherty County No. 2*, the evidence suggests that the decision to submit the proposed improvements to the voters in one question rather than in two or more questions was a singular decision premised upon the facts of this particular situation. That the decision was to some degree premised upon political realities does not undermine that decision; nor does it make that decision in some fashion sinister or manipulative. Elected bodies like the school board of Bibb County, comprised of individuals nominated and elected in presumably valid elections in which all voters had an equal opportunity to participate, must be afforded some freedom to engage in the traditional political tools of consensus-building and compromise to effectuate comprehensive plans for school and community development and improvement. Government in the United States, be it federal, state or local, takes the form of representative democracy. That does not mean, of course,

that representatives once elected are free to disregard the law; however, the functioning of a representative democracy must be contrasted with the functioning of a pure democracy. Representatives are elected to pursue an agenda which benefits the community at large. They may be re-elected or cast out of office, depending upon their performance or lack thereof. This scheme of government does not contemplate a vote by every individual on every single issue in isolation or in the abstract. Some trust and some faith must be placed in the elected representatives of the people. The Georgia cases discussed *supra* recognize that principle and establish boundaries beyond which that trust is suspect. And as those cases demonstrate, Georgia law provides various mechanisms by which the citizens may challenge the conduct of their representatives in this regard.

To accept plaintiffs' position in this matter is to invite chaos. Any and all matters which are to be submitted to the electorate for its approval or disapproval, be that matter a proposal by a local board for a bond issue to construct a new high school or be it an amendment proposed by a state legislature, would be subject to challenge under the Voting Rights Act.[9] This court finds

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[9] Language from *Dougherty County No. 2* is informative on this point:

> In response defendant school board argues that plaintiff in effect is suggesting that under the Voting Rights Act the Attorney General or the United States District Court for the District of Columbia must pass judgment upon every board of education decision to grant or withhold leave without pay to an elected official to attend to the duties of his office. If this be true, the defendant board suggests the Voting Rights Act has removed the board's authority to do anything without going to Washington for approval.

Dougherty County No. 2, 579 F.Supp. at 1490, citing *Dougherty County No. 1*, 439 U.S. at 54, 99 S.Ct. at 380, 58 L.Ed.2d at 287 (Powell, J., dissenting). The basis of the concern expressed by the three-judge panel above has come to pass in the case *sub judice*. The following discussion, elicited during the hearing on plaintiffs'

plaintiffs' position unfounded either in law or in logic. Section 2(a) of the Voting Rights Act "prohibits all

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Section 5 claim, illustrates that the concern expressed by the three-judge panel in *Dougherty County No. 2* was well founded.

JUDGE HILL: Well now, let me be sure I understand your contention. Would that apply no matter how they came down if they—if they discussed what to put on, then whatever answer they came up with would be a Voting Rights Act change? Let me be a little clearer. Suppose they had come up with the idea, "We shall put each of these separate," that would be a change?

MR. BRADLEY: Yes, Your Honor.

JUDGE HILL: And if they'd said, "We will put each school to be air conditioned separately," that'd be a change and if they said, "We'll put them all together," that would be a change so however they decided to put the question would have to be precleared?

MR. BRADLEY: When they're deciding what questions to put on the ballot, yes, Your Honor. To back up from that to perhaps more clearly explain my position, if they debate whether or not to air condition schools and decide they're going to air condition half of them—

JUDGE HILL: Suppose they decide to air condiiton all of them but they decided the way to put this would be to put to the voters each as a separate bond issue, so many dollars to air condition School "A" and so many dollars for School "B" as a separate question and "C" and all the rest, that would be subject to preclearance?

MR. BRADLEY: Yes, Your Honor.

JUDGE HILL: And if they decided to air condition all the schools and put that question, "Sha.. we air condition all the schools? that would require preclearance?

MR. BRADLEY: Yes, Your Honor.

JUDGE HILL: So there would be no question that could be put in a bond referendum anywhere in any jurisdiction covered by the Act that would not have to be precleared by the Department of Justice, would there? Could you conceive of one?

MR. BRADLEY: Because bond issues are not regularly scheduled elections, I don't believe I can conceive of one.

JUDGE HILL: Well now, I'm assuming the date issue now is out of the window, that's been precleared?

MR. BRADLEY: Yes, Your Honor.

JUDGE HILL: So even if you had—if the Constitution of a state established the dates upon which bond issues would

states and political subdivisions from imposing any qualifications or prerequisites to voting, or any standards, practices, or procedures which result in the denial or abridgment of the right to vote. . . ." *Thornburg v. Gingles*, 478 U.S. at 43, 106 S.Ct. at 2762, 92 L.Ed.2d at 42. However, Section 2(b) expressly cautions that "nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.* at 43, 106 S.Ct. at 2763, 92 L.Ed.2d at 42 (brackets in original). This statutory language establishes a boundary to the concept of "vote

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be put, the construction of the question would still be subject to preclearance, is that right?

MR. BRADLEY: Yes, Your Honor.

JUDGE FITZPATRICK: Let me ask you this question, what if we're dealing with one school and you want to—the School Board says, "Well, we want to air condition this school and we also want to build a gymnasium there at this school and while we're doing that, we need to enlarge the library to make the library more attractive and do three or four different projects all on this—in this same school," would you have to separate each one of those projects, for instance, to give people [a chance] to say, "Well we want to air condition it but we don't want the new gym. We don't think we ought to refurbish the library," or "build a new teacher's lounge," or whatever, is that—am I off in the wild blue younder with this scenario?

MR. BRADLEY: No, Your Honor. And my answer is the Board does not have to separate it; it can make whatever choice it wants to, to have five bond issues for each particular facility or to have one.

JUDGE FITZPATRICK: Oh, you could have a bond issue to say to—dealing with Northwest School or Southeast School or whatever, $25,000,000 to air condition, build a gym, refurbish the auditorium, all of that, and you could—you vote for it or against it?

MR. BRADLEY: The Board could do that.

JUDGE FITZPATRICK: And that would be okay?

MR. BRADLEY: They would still have to submit it for preclearance under the Voting Rights Act.

Transcript of November 1, 1988, Hearing Before Three-Judge District Court, pp. 9-12.

effectiveness"; by analogy, Section 2 clearly does not establish a right to have those proposals which must be submitted to the electorate phrased in such a way that any particular group is ensured of success. Yet that is what plaintiffs desire—an opportunity to isolate certain issues which are allegedly favorable to a particular group at the expense of a comprehensive plan which elected officials have formulated for the overall good of the community.

The reapportionment decisions of the Supreme Court [10] support this court's understanding of the term "vote effectiveness" as that term relates to the concept of "dilution." Clearly, political units may not structure voting districts in such a manner as to make impossible the election of minority candidates. The matter before this court, however, is qualitatively different from such a situation. Here, each individual, black and white, had an opportunity to cast an effective vote for or against a comprehensive school improvement/development plan. The matter was thoroughly discussed in the community. No voter was misled. This court cannot find that "vote effectiveness" means a right to vote on each individual issue considered by its elected officials.

This court reiterates what the *Burger* court recognized earlier: every individual qualified to vote in the November 8th election had the opportunity to express his or her approval or disapproval of the bond issue. Those voters, like the school board itself, had to weigh the pros and cons of the propasal as a whole. Then, based on their understanding of the merits of that proposal, the voters expressed their preference, albeit by a narrow majority, to support a comprehensive scheme of improvement in the Bibb County school system. Such is the way in which the political system functions.

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[10] *See Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976); *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973).

In conclusion, this court determines that the exercise of discretion by validly elected local board officials in determining the number of questions to be submitted to the electorate for its approval or disapproval at the ballot box is not a standard, practice, or procedure. Alternatively, the court finds that even if such exercise of discretion was a standard, practice, or procedure, such practice does not affect voting. The manner in which the proposal was structured had and has absolutely no bearing upon the qualification of any individual to vote, the ability of any individual to register to vote, the opportunity of any individual to cast his or her vote, or the manner in which any individual's vote was tabulated. Plaintiffs' claim as premised upon Section 2 of the Voting Rights Act is therefore DENIED.[11]

SO ORDERED.

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[11] The court's resolution of this matter negates the need to consider the "results" of the alleged standard, practice, or procedure. The 1982 amendments to the Voting Rights Act re-instituted the "results" test, making clear that a Section 2 violation could be proved by showing discriminatory effect alone. *See Thornburg*, 478 U.S. at 35, 106 S.Ct. at 2758, 92 L.Ed.2d at 37. The court is aware that plaintiff has filed certain information regarding voting patterns in the bond issue and other elections. Plaintiff has also filed voluminous documents entitled plaintiffs' request for judicial notice of historic racial discrimination. The court has examined those pleadings; however, those documents are pertinent to the "results" aspect of this case, an issue which this court did not reach.

APPENDIX C

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-8556

DAVID LUCAS, *et al.*,
Plaintiffs-Appellants,

versus

JUDY TOWNSEND, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion August 9, 1990, 11th Cir., 19—, —— F.2d ——)
(October 30, 1990)

Before: HATCHETT, Circuit Judge, RONEY * and FAIRCHILD **, Senior Circuit Judges.

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Hon. Thomas E. Fairchild, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
M.D. GEORGIA
MACON DIVISION

Civ. A. No. 88-166-1-MAC (WDO)

DAVID LUCAS, *et al.*,
Plaintiffs,

v.

JUDY TOWNSEND, *et al.*,
Defendants.

Nov. 2, 1988

Neil Bradley, Atlanta, Ga., for plaintiffs.

W. Warren Plowden, Ed S. Sell, Jr., Macon, Ga., Della Wager Wells, Atlanta, Ga., for defendants.

Before HILL, Circuit Judge, OWENS, Chief Judge, and FITZPATRICK, District Judge.

OWENS, Chief Judge:

Included for consideration by Bibb County voters on the general election ballot is the question of whether twenty-nine (29) million dollars of general obligation bonds should be issued to pay for the following improvements within the Bibb County school system: (1) air conditioning all existing schools not presently air conditioned; (2) building a fifth high school to serve a projected 53% black—47% white student body; and (3) renovating Northeast High School into a magnet high school. The selection of November 8th, the date of the

general election, as the date for this bond referendum was submitted to and precleared by the Attorney General of the United States pursuant to the Voting Rights Act of 1965. Nevertheless, plaintiffs contend that the Voting Rights Act requires the submission to the Attorney General of not only the date for this bond referendum but also the form or the structure of the question itself. Plaintiffs contend that the discretionary decision of the school board to submit the approval or disapproval of the entire twenty-nine (29) million dollar bond issue to the electorate as a single bond issue rather than to submit the questions of (1) air conditioning existing schools, (2) constructing a new school, and (3) renovating Northeast High School as three separate bond issues is a "change affecting voting." [1] Arguing that the form of the bond referendum has been neither submitted to nor precleared by the Attorney General,[2] plaintiffs ask this three-judge court [3] to enjoin the inclusion of this bond referendum on next Tuesday's general election ballot.

DISCUSSION

In 1965 Congress enacted the Voting Rights Act to eliminate the racial discrimination in voting that Congress believed to still exist in a minority of the states of

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[1] During oral arguments held before a district court of three judges, plaintiffs argued that the school board's decision would have been equally as cognizable under Section Five of the Voting Rights Act if the board had determined to submit the issues to the electorate as separate questions rather than as a single package. Thus, plaintiffs effectively argue that *any question* submitted by ballot to the electorate must be precleared by the Attorney General.

[2] The parties disagree as to whether the form of the question was in fact submitted to and precleared by the Attorney General. In light of this court's decision, *see* Discussion, *ante*, the court need not address this dispute.

[3] "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." 42 U.S.C. § 1973c.

these United States, chiefly those in the traditional South. As contemplated, only eleven states were brought within the coverage of the Act—South Carolina, Alabama, Alaska, Georgia, Louisiana, Mississippi, Virginia, twenty-six counties in North Carolina, three counties in Arizona, one county in Hawaii, and one county in Idaho. *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

Section Five of the Act, 42 U.S.C. § 1973c, provides that whenever a covered state or political subdivision "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . ." it may not utilize or implement such change until (a) it has secured a judicial determination in the United States District Court for the District of Columbia that the change does not have the purpose or effect of denying the right to vote on account of race or (b) it has submitted such change to the Attorney General of the United States and the Attorney General has not interposed an objection within sixty days. While the Act does not specifically provide a remedy for failure to comply with Section Five, the Supreme Court has held that a complaint for injunctive relief to be heard by a district court of three judges may be filed in any United States District Court and that court, if it is shown that Section Five applies, must enjoin the utilization or implementation of such change until Section Five is complied with. *Allen v. Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

A district court of three judges convened pursuant to Section 5 of the Voting Rights Act conducts a limited inquiry. First, the court determines whether questioned activity is a covered voting change. If, and only if, that question is answered in the affirmative, the court then determines whether the questioned activity has been precleared either by the Attorney General or by declaratory

judgment from the United States District Court for the District of Columbia. *See United States v. Board of Supervisors*, 429 U.S. 642, 645-47, 97 S.Ct. 833, 834-35, 51 L.Ed.2d 106, 110 (1977).

While to effectuate the purpose of the Voting Rights Act, Section 5 is to be given broad scope, *NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 175-76, 105 S.Ct. 1128, 1133-34, 84 L.Ed.2d 124, 132 (1985); *Allen v. Board of Elections*, 393 U.S. 544, 566-67, 89 S.Ct. 817, 832-33, 22 L.Ed.2d 1, 17-18 (1969), "[t]he language of § 5 clearly provides that it applies only to proposed changes in voting procedures." *Beer v. United States*, 425 U.S. 130, 138, 96 S.Ct. 1357, 1362, 47 L.Ed.2d 629, 638 (1976), quoted in *McCain v. Lybrand*, 465 U.S. 236, 245, 104 S.Ct. 1037, 1043, 79 L.Ed.2d 271, 279 (1984).

Plaintiffs contend that the school board's exercise of its discretion in submitting the school improvement plan to the voters as a single question is by definition a "change affecting voting." Defendants vigorously argue that the school board's exercise of its discretion in this matter is not a "change affecting voting."

While the exercise of discretion in setting dates for elections, changing candidate qualifications or altering voting procedures have all been held to constitute changes requiring Voting Rights Act preclearance, *see e.g.*, *NAACP v. Hampton County Election Comm.*, *supra*; *Dougherty County, Georgia, Board of Education v. White*, 439 U.S. 32, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978); *Allen v. State Board of Elections*, *supra*, plaintiffs have cited no authority for the proposition that a school board's or any other board's exercise of discretion in formulating a question to be submitted to the electorate constitutes a change affecting voting. Likewise, defendants are unable to provide this court with authority supporting their position that it is not a covered change.

Though not binding upon this or any other court, the Attorney General's interpretation of both the scope of

Section 5 and his regulations promulgated thereunder is entitled to particular deference. *See Dougherty County, Georgia, Board of Education*, 439 U.S. at 39, 99 S.Ct. at 372, 58 L.Ed.2d at 278; *NAACP v. Hampton County Election Comm.*, 470 U.S. at 178-79, 105 S.Ct. at 1135-36, 84 L.Ed.2d at 134. Due to the novel nature of plaintiffs' contentions and the absence of either case authority or a regulation on point, the Attorney General was invited by the panel of three judges to submit his views on the matter under consideration. In response, the United States of America applied for leave to participate in this case as *amicus curiae*. The United States' application was granted on November 1, 1988.

In its *amicus curiae* brief, the United States noted that state law enables county school boards to seek the issuance of bonds upon a determination that the incurrence of such debt is in the "best interests of education in the county." Brief for United States as *Amicus Curiae* ("*Amicus* Brief"), 3; O.C.G.A. § 20-2-430. "[D]ecisions such as the manner in which the purpose of the bonds is identified, whether to seek, at one election, a single bond or several separate bonds for discrete projects or to present separate bond requests at different elections, are left to the defendants' discretion." *Amicus* Brief at 4 (footnote omitted). Commenting upon the above-described state procedure, the Attorney General stated that "the normal formulation of policy by elected representatives, *e.g.*, setting employees' salaries, hiring employees, adopting capital budgets, [does] not constitute [a change] affecting voting, even though [the decisions] result in the exercise of discretion and even though a referendum may be required for final decision." *Id.* at 16. The Attorney General concluded that "the board's decision to air condition existing schools and to construct new schools is a routine matter for the board to decide and attracts no pre-clearance obligation." *Id.* Further, the school board's "discretionary decision to present the voters with a single vote on the entire bond project is not the kind of

change subject to preclearance." *Id.* Such a decision is a "normal legislative decision unrelated to the process of holding elections." *Id.* at 17.

After careful consideration, this court agrees with the views held by the United States. First, Georgia school boards before November 1, 1964, were authorized to and had exercised their discretion in formulating questions for bond referendums. The exercise of discretion by the Bibb County school board was thus no change. Second, the form or structure of a question on a bond referendum is not a standard, practice or procedure affecting voting. The discretionary decision to submit one or more questions to the electorate is one properly left to the political process.

> It tortures the language of the Act to conclude that [the form of a question on a bond referendum], having nothing to do with the conduct of elections as such, is state action "with respect to voting." No one is denied the right to vote; nor is anyone's exercise of the franchise impaired.

Dougherty County, Georgia, Board of Education, 439 U.S. at 51, 99 S.Ct. at 379, 58 L.Ed.2d at 286 (Powell, J., dissenting) (language within brackets substituted for original by this court).

Plaintiffs' motion for a preliminary injunction is thus DENIED this 2nd day of November, 1988.

APPENDIX E

UNITED STATES DISTRICT COURT
M.D. GEORGIA
MACON DIVISION

Civ. A. No. 88-166-1-MAC (WDO)

DAVID LUCAS, *et al.*,
Plaintiffs,

v.

JUDY TOWNSEND, *et al.*,
Defendants.

March 7, 1989

Neil Bradley, Laughlin McDonald, Kathleen Wilde and Derek Alphran, American Civil Liberties Union Foundation, Inc., Atlanta, Ga., for plaintiffs.

Craig N. Cowart and W. Warren Plowden, Jones, Cork & Miller, Ed. S. Sell, Jr. and Buckner F. Melton, Sell & Melton, Macon, Ga., and Della Wager Wells, King and Spalding, Atlanta, Ga., for defendants.

Before HILL, Circuit Judge, OWENS, Chief Judge, and FITZPATRICK, District Judge.

ORDER

The parties having stated at a pretrial conference held on March 2, 1989, before the originating judge that they do not desire to present further evidence or briefs on the issues required to be heard by this 28 U.S.C. § 2284 court of three judges, this court of three judges, for the reasons

set forth in its order of November 2, 1988, does hereby declare and adjudge that the decision of the defendant Bibb County Board of Education to submit a single twenty-nine million dollar bond issue by referendum to the voters of Bibb County, Georgia rather than to submit four separate bond issues for the four categories of school improvements to be paid for by said bond issue, is not encompassed by Section Five of the Voting Rights Act of 1965 and, therefore, did not have to be submitted to the Attorney General of the United States for Section Five preclearance.

There being no further issues to be decided by this court of three judges, this court of three judges does hereby dissolve itself, leaving all remaining issues to be decided by the originating judge. Further, there being no just reason to delay entry of judgment on plaintiffs' Section Five claims, the clerk is expressly directed to enter judgment thereon for the defendants. Rule 54(b), Federal Rules of Civil Procedure.

SO ORDERED.

APPENDIX F

IN THE SUPREME COURT OF
THE UNITED STATES

No. 89-400

DAVID LUCAS, *et al.*,
appellants

v.

JUDY TOWNSEND, *etc.*, *et al.*

Appeal from the United States District Court
for the Middle District of Georgia

Former decision, 110 S.Ct. 230; 110 S.Ct. 319.

Case below, 686 F.Supp. 902; 698 F.Supp. 909; 714 F.Supp. 525; 732 F.Supp. 1581.

Jan. 22, 1990. The judgment is affirmed.

Supreme Court, U.S.
FILED
MAR 27 1991
OFFICE OF THE CLERK

(2)

No. 90-1167

In The

Supreme Court of the United States

October Term, 1990

THE BOARD OF PUBLIC EDUCATION and ORPHANAGE FOR BIBB COUNTY, GEORGIA, et al.,

Petitioners,

versus

DAVID LUCAS, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, after petitioners changed a referendum from an election date with high black voter turnout to a date when voter turnout was expected to be low, the court of appeals correctly ruled that the combining of bond issues into one referendum question which forced minority voters supporting one project to either vote in favor of other projects they might not support, to abstain from voting, or to vote against the project they favored, was a standard, practice or procedure affecting voting that has the potential for abridgement of the right to vote on account of race under Section 2 of the Voting Right Act of 1965, 42 U.S.C. § 1973.

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No. 90-1167

In The

Supreme Court of the United States

October Term, 1990

THE BOARD OF PUBLIC EDUCATION and ORPHANAGE FOR BIBB COUNTY, GEORGIA, et al.,

Petitioners,

versus

DAVID LUCAS, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents David Lucas, Willie Davis, Jr., Connie Cater, Corlis McKenzie and Ronnie T. Miley respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion which reversed and remanded for consideration, *inter alia*, of respondents' claim premised on Section 2 of the Voting Rights Act, 42 U.S.C. § 1973.

OPINIONS BELOW

The petition appendix does not contain the following opinions – the opinion of the district court denying respondents' first motion for preliminary injunction, reported at 686 F.Supp. 902 (M.D.Ga. 1988), appended hereto at 1A, and the opinion entered upon granting a stay pending appeal and enjoining the holding of the May 31, 1988 bond referendum election, reported at 486 U.S. 1301 (1988) (KENNEDY, J., in chambers), appended hereto at 7A.*

STATEMENT OF JURISDICTION

Petitioners assert jurisdiction in this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners, the Board of Public Education and Orphanage of Bibb County, Georgia (hereinafter "the Board") and related public officials of the county seek review of the determination by the U.S. Court of Appeals for the Eleventh Circuit that the form and structure of a

* Reference to the appendix hereto are "___A." References to the petition appendix are "___a." References to the record are to the record document number, *e.g.*, "R21."

referendum question may violate Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.[1]

Proceedings Below. Respondents, black registered voters of Bibb County and plaintiffs below, instituted this action contending that the Board removed from the ballot a bond issue that black citizens favored (air conditioning for existing schools) and combined it with several other bond issues which black citizens opposed (mainly construction of a high school in a white neighborhood when there was space available in a majority black high school) and scheduled the referendum for a later, special election. The air conditioning issue was originally scheduled to be on the ballot on the March 8, 1988 presidential preference primary popularly known as Super Tuesday, an election at which high black voter turnout was expected and occurred, but the combined issues were scheduled for a special election at which no other item or races were on the ballot, on a day after a national holiday at which low voter turnout would be expected.

Respondents contended that the setting and changing of the election date and the removal of the one issue and combining it as one ballot question with others were "standards, practices or procedures" under the Voting Rights Act. The complaint was brought under Sections 2

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[1] Section 2 states in relevant part that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . "

and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973 and 1973c, and the first, thirteenth, fourteenth and fifteenth amendments of the Constitution.

Respondents were successful in getting an injunction to stop the special election set for May 31, 1988. Special elections in Bibb County are required to receive preclearance under Section 5 of the Voting Rights Act. 28 CFR § 51.17 (1987). The Board did submit the special election to the Attorney General of the United States, but when the Attorney General requested additional information rather than preclearing the special election, the Board proceeded with plans to hold the election. Though the three-judge district court denied a preliminary injunction, ruling that the Attorney General's regulation designating special elections as covered changes under Section 5 was not authorized under the Act, the election was enjoined by the Circuit Justice. See appendix hereto, at 1A and 7A.

The Board rescheduled the bond referendum (with four bond issues combined into one ballot question) for the general election on November 8, 1988. Respondents unsuccessfully sought to enjoin the referendum at that election, again contending that the combining of issues required preclearance under Section 5. 38a. The three-judge district court entered judgment for the Board that the structure of the referendum question did not violate the preclearance requirement of Section 5. 44a. Respondents' appeal to this Court on the Section 5 issue was affirmed. 46a.

The single judge district court held subsequently that the form and structure of the referendum question was

not a standard, practice or procedure affecting voting under Section 2 and dismissed respondents' Section 2 claims. 17a *et seq.*[2]

On appeal to the Eleventh Circuit, the court of appeals reinstated the complaint holding that respondents did state a claim under Section 2. The Court rejected the Board's argument that this Court's summary affirmance on the Section 5 appeal foreclosed the claim under Section 2, stating that "because two reasons exist for the Supreme Court's affirmance, it did not *necessarily* decide the issue of whether the form of a bond referendum question is a standard, practice or procedure affecting voting." 9a. (Emphasis in original.) After examining cases of this Court and inferior courts under Sections 2 and 5, the court concluded respondents' claim was encompassed by Section 2. 9a-15a. It stated:

> How the Board presents projects to the voters, whether as single-issue or multiple-issue referendums, becomes a political decision with the potential for diluting or submerging the minority vote as prohibited by section 2. . . . By combining projects in one referendum, the Board forced minority voters supporting one project to either vote in favor of other projects they might not support, to abstain from voting, or to vote against the project they supported. Their political will to defeat certain propositions

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[2] The opinion only addressed Section 2, not mentioning respondents' constitutional claims. A judgment captioned "Final Judgment" was entered, R61, but by its terms it also covered only Section 2. The Court of appeals directed the district court to determine the status of the constitutional claims. 15a, n.7.

is effectively diluted or submerged by the combination of multiple projects in a single referendum.

13a. The court did not reach the merits of the claim but remanded for proceedings consistent with its opinion.

Facts Material to the Question Presented.

1. *The Referendum Form and Structure Decisions.* The Board had for several years considered a number of projects - one was the air conditioning of older buildings and another was the construction of a high school. On December 17, 1987 a black member of the Board, Robert Brown, moved to place the air conditioning bond referendum on the March 8, 1988, presidential primary (Super Tuesday) ballot.[3] Jesse Jackson's name would be on that ballot as it had been in 1984, which resulted in high black voter turnout (59%) compared to white voter turnout (37%). R48, p. 17; R58, p. 48. Four black members joined with one white member of the Board to adopt the motion. R4, p. 52. This decision was opposed by the county commission, which itself had previously placed a controversial one cent sales tax on the Super Tuesday ballot. R4, p. 57. The county commission had hired a consultant to help decide when to hold its sales tax referendum. R21 (Stipulation of Facts). The consultant studied turnout data for past elections, including the 1984 presidential primary, and recommended against having the school bond

[3] The county commission, not the Board, has the authority to call a referendum election, O.C.G.A. § 36-82-1, but as a practical matter the county commission, which is a party hereto, accedes to the Board's requests.

issue and the sales tax referendum together on the Super Tuesday ballot and reported:

> The presidential preference primary (Super Tuesday) to be held in March may attract large numbers of voters that are not prepared to cast an informed vote on the sales tax referendum.

Ibid., report of Kermit Keenum.

Three weeks after its original vote, the Board rescinded the motion calling for the air conditioning referendum, voting strictly on racial lines. R4, p. 57. It decided to consolidate the air conditioning issue and the school construction issue into one ballot question and to hold the election as a one-item special election the day after Memorial Day, despite the "possibility of a smaller voter turnout for a one-item vote." R4, p. 57. A second vote to separate the multiple issues into individual ballot questions was rejected strictly along racial lines. 3a, R-21, Board minutes of June 9, 1988, p. 3. The six white members followed the recommendation of the superintendent who strongly opposed dividing the issues. He recommended:

> In order to . . . structure a program which has the best chance of passing, . . . the Administration believes that we should keep the package together and try to get as many persons as possible who have an interest in any part of it to support it.

R21 (Stipulation of Facts).

2. *The School Bond Issues as Racially Divisive Issues.*[4] There was a difference between white and black voters in Bibb County on the referendum issues. As noted above, all black board members voted to separate the multiple issues into separate ballot questions. R-21. The Baptist Ministers Union/Evangelical Ministerial Alliance, composed of all black ministers in Macon, favored the air conditioning project but opposed the construction of the high school. The ministers issued a statement that they were "committed to supporting air conditioning for children," but urged voters to vote against the combined bond question. R23, p. 10. David Lucas, one of the respondents, a state representative for fourteen years with children in the public schools, along with other black citizens opposed the construction of a new high school believing that there was space available in a predominantly black high school and that the location of the proposed school in a white area would put the burden of bussing disproportionately on black students. R23, p. 9.

3. *Election Turnouts, Results and Racially Polarized Voting.* The combined bond referendum passed with 50.8% of the vote, a margin of 628 votes. White turnout was higher than black turnout, 71% of whites compared to 60% of blacks. At the originally scheduled Super Tuesday referendum date with Jesse Jackson's name on the

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[4] The following facts concerning racial division and polarized voting are in the record but are not set out as conclusive on these issues, for no trial has been held. Respondents set them out to illustrate how the timing of an election and the ballot format can be utilized to dilute minority voting strength.

ballot, black and white turnout were almost equal, 51% of blacks, 52% of whites. R48, p. 19.

Respondents presented an analysis of 15 elections in Bibb County between 1979 and 1988, including the school bond and sales tax referendums in 1988. Dr. Michael Binford conducted a regression analysis on those elections, the same procedure utilized in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

In the twelve black/white elections plus the 1988 presidential general election, the correlation coefficient ("r") between votes and racial composition of the turnout was always between .91 and .99, 1.0 being a perfect correlation. The amount of variance ("r squared") explained by the correlation coefficient ranged from .84 to .99. R48, pp. 3 through 7. The table compiled by Binford on these races is reproduced at 12A, *infra*. Binford subsequently analyzed seventeen additional races in Macon and Bibb County between 1971 and 1988, and these buttressed his conclusion that "racially polarized voting exists in Bibb County." R58, p. 3.

The ecological regression estimates conducted by Binford showed that 66% of blacks voted against the combined bond referendum; 57% of whites voted for. R48, pp. 3-7. Thus a majority of each race voted on opposing sides, and the difference between the races in their support of (or opposition to) the referendum was 23%.

More voters of both races turned out in November, 1988 (when the school bond referendum was held) than in March, 1988 (Super Tuesday, the date of the originally scheduled air conditioning bond issue), but white voters

turned out at a much higher rate than blacks in November. Binford concluded that if black voters in November had matched the white turnout as they had in March, and the degree of polarity had continued as the ecological regression indicates, the referendum would have been narrowly defeated. R48, p.5.

REASONS FOR DENYING THE WRIT

I. The Opinion Below Reversing and Remanding for Consideration of Respondents' Section 2 Complaint is Not Ripe for Review.

This case is not ripe for review. No trial has been held and the court of appeals merely remanded the case for further proceedings.

Subsequent to a pre-trial conference, the district court ruled that the determination of "the number of questions to be submitted to the electorate for its approval or disapproval at the ballot box is not a voting standard, practice, or procedure" and denied respondents' claim under Section 2. 35a. The court of appeals found that a challenge to the form or structure of a referendum question can state a claim under Section 2, but appropriately did not reach the merits "because the district court did not rule on the 'results' aspects of this case." 15a. The case was remanded to the district court "for the determination of whether section 2 has been violated." *Ibid.*

It is not the usual practice of this Court to review a case prior to final judgment, when a court of appeals has

remanded, because the case is not ripe for review. *Brotherhood of Locomotive Fireman v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916). Denial of review at this stage is appropriate here.

In addition, this case may yet be resolved below on factual grounds. Any need for this Court's review may be obviated by development of facts. The parties have never had a trial in which a finder of fact could explore the evidentiary bases for respondents' claims. The claims and defenses may present different issues when fleshed out with a full factual record. *Cf. U.S. Dept. of Labor v. Triplett*, ___ U.S. ___, 110 S.Ct. 1428 (1990). The courts below could rule for either petitioners or respondents in such a way as to obviate the question of interpretation of Section 2. If the findings are that no racial effects sufficient to violate Section 2 are present, the need to construe the coverage of Section 2 would not arise. Conversely, if invidiously discriminatory racial purpose and effect are found, respondents would prevail under their constitutional claims regardless of the scope of Section 2.

Review by the Court at this stage of the proceedings is simply premature.

II. The Court of Appeals Decided Section 2 of the Voting Rights Act Covers How Ballot Questions Are Presented, Not, As Petitioners Contend, What Issues May be Placed on Ballots.

The Board's first question presented, which contends the court of appeals' opinion allows voters "to challenge a policy decision of a school board as to what bond issues

to submit to the voters," Petition, (i), simply is not at issue in this case, was not decided by the court below, and is not presented here.

The Board's authority to decide on the propriety of projects and to submit those projects to voters for approval of bonded indebtedness is unaffected by this litigation. Nothing in this case even suggests that the Board may not present any and all projects to the voters. What respondents contend, and what the court of appeals decided respondents must be heard on, is that "the structure of the referendum question" requiring an all or nothing vote on racially divisive issues diluted minority voting strength. The complaint repeatedly uses the phrase "the structure of the referendum," Complaint, R1, ¶¶ 25, 28, 29, 30. It does not challenge the *substance* of the items to be placed on the ballot or the authority to place them on the ballot. It does challenge the Board's election decisions – how those items appear on the ballot and how votes are to be cast and counted for them.

The Board's argument that the court of appeals held voters have the right under Section 2 to place items up for referendum is of whole cloth. There is nothing to review on this point and this is not grounds for issuing the writ of certiorari.

III. The Holding of the Court of Appeals that the Structure of a Referendum Question is a "Standard, Practice or Procedure" Affecting Voting Under § 2 of the Voting Rights Act is Correct and Does Not Merit Review by this Court.

A. Section 2 Covers Practices Which Affect How Votes are Cast and The Decision to Have One Referendum Question on Separable Bond Issues Does Just That.

The court of appeals was correct in holding that the practice of combining separable referendum issues into a single question could, in some situations, "dilute a minority vote as effectively as anti-single shot voting procedures and straight ticket voting requirements." 15a. The anti-single shot and straight ticket comparisons are apt. Such laws compel voters to vote a full slate, thus casting ballots for those they do not support. *Dunston v. Scott*, 336 F.Supp. 206 (E.D.N.C. 1972) (3-judge court). Combining the bond issues here operated in the same manner. As reflected in the statement of the Baptist Ministers Union/ Evangelical Alliance, minority voters faced the choice of opposing a project they favored in order to vote against a project they opposed. Voters favoring all or none of the bond issues were able to cast a fully effective ballot. Those voters divided on the issues were not.

The Voting Rights Act was designed to cover all practices that affect voting, and referendum elections are included in the scope of the Act. The definition of voting for Section 2 is found in 42 U.S.C. § 1973*l*(c)(1):

> The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant

> to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office *and propositions for which votes are received in an election.*

(Emphasis added.)

This Court long ago recognized that the right to vote "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Congress recognized this in drafting the Voting Rights Act and defining "voting" broadly in the Act. *Allen v. State Board of Elections*, 393 U.S. 544, 565-66 (1969). From *Allen* to *Thornburg v. Gingles*, 478 U.S. 30 (1986), the broad scope of potentially discriminatory devices has been recognized.

The Senate Report accompanying the 1982 amendments to the Voting Rights Act states that Section 2 "also prohibits practices, which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members." S. Rep. No. 417, 97th Cong., 2d Sess., 30, reprinted in U.S. Code, Cong. & Admin. News 177 (1982). Consistent with the language of the Act and the legislative history, Section 2 has been applied to a range of election related practices. *Brown v. Dean*, 555 F.Supp. 502 (D.R.I. 1982) (polling place locations); *Harris v. Graddick*, 593 F.Supp. 128 (M.D.Ala. 1984) (appointment of poll officials). For examples of other practices held covered by Section 2 see cases collected at S. Rep. No. 417, 30, n. 119 and H. Rep. 227, 97th Cong., 1st Sess.,

14-17 (1981). A broad construction of Section 2 is consistent with this Court's opinion in *Thornburg v. Gingles*, 478 U.S. at 45, n. 10 ("Section 2 prohibits all forms of voting discrimination, not just vote dilution. S.Rep. at 30.")

B. The Board's Actions in Setting the Time of the Election and the Ballot Structure were Political/ Election Practices.

The Board's actions in setting the time of the referendum election and combining the bond issues into one question were political/election practice decisions. The Board was engaged in a political campaign and was structuring the election to enhance its chance of winning. There is nothing inherently sinister in this. This is what is expected of referendum proponents who control the timing of the election and the ballot format. But because election dates and ballot structure affect minority political participation, they are subject to challenge under Section 2.

The Board's own statements make clear the purely political aspect of its decisionmaking. *E.g.*, the superintendent's report, quoted *supra*, 7, on how to "structure a program which has the best chance of passing"; the consultant's report that the Super Tuesday primary "may attract large numbers of voters that are not prepared to cast an informed vote," quoted *supra*, 7. Even to this Court the Board argues the decision of the court of appeals will make it "virtually impossible . . . to forge the coalitions and compromises necessary to fund most projects." Petition, 9.

The timing and structure of a referendum are clearly "standards, practices or procedures" affecting voting. The court of appeals was correct in ruling that Section 2 of the Voting Rights Act proscribes their manipulation in a manner that dilutes minority voting strength.

C. The Evidence in This Record Illustrates How Referendum Timing and Structure Can Dilute Minority Voting Strength to Come Within Section 2.

Respondents have set out in their statement of the case some of the facts illustrating how the manipulation of the ballot timing and structure can dilute minority voting strength.

When Robert Brown and the other black Board members voted to put the air conditioning issue on the 1988 Super Tuesday ballot, they knew Jesse Jackson would be on the ballot and a high black voter turnout was expected. When petitioners removed the referendum from Super Tuesday, they had studied the voter turnout at the 1984 presidential preference primary, at which blacks had turned out at a much higher rate than whites. The Board then picked an election day which was expected to result in low turnout. The November election date at which the referendum was finally held resulted in whites having an advantage, by virtue of high white voter turnout, they did not have in the March election.

The Board's decision to combine the air conditioning and high school construction into one ballot question was made at a time when it knew that black voters supported the air conditioning and that there was substantial black

voter opposition to the school construction. The decision to combine the questions was specifically made to affect how people voted, to diminish voting against the school construction.

The referendum results were racially polarized despite the Board's efforts to minimize black voters' opposition to the school construction. Though the vote on the referendum was not as polarized as other votes in Bibb County, 12A, the facts that the majority of black and white voters cast their votes on opposite sides and that the spread between black and white voter support or opposition was 23% strikingly illustrate that the referendum issues were racially divisive. Further, the closeness of the vote and the different turnouts between March and November, coupled with the racial polarization, indicates the manipulation of the date and ballot question affected the outcome of the election. The referendum carried though 66% of minority voters opposed it, and the evidence in the record strongly indicates the results would have been different if the original election date had been used. This case presents a classic instance of dilution of the minority vote.

The court of appeals was correct in holding the Board's actions were encompassed by Section 2 of the Voting Rights Act. The decision below is consistent with the language and legislative history of the Act, and plenary review is not warranted.

D. The Court of Appeals Correctly Adhered to the Law That Summary Affirmances are Binding on Lower Courts.

In the Section 5 part of this case, this Court summarily affirmed the judgment of the three judge district

court that the decision to combine the bond issues into one referendum question did not violate Section 5 of the Voting Rights Act for failure to receive preclearance. 44a, 46a. Petitioners urge review contending that the court of appeals' decision is in direct conflict with this summary affirmance. Petition, 13.

To the contrary, the court of appeals correctly acknowledged that all inferior courts are bound by any question necessarily decided by a summary affirmance by this Court. 7a. The court also correctly decided that the summary affirmance could have been based on one of two rationales – that the Board's action was not a change in voting practices because it was authorized by statutes pre-existing the effective date of the Act, or that it was not a voting practice. 9a.[5]

The argument in this section demonstrates that the court of appeals' decision – that the Board's actions were standards, practices or procedures affecting voting within the meaning of Section 2 – was correct and plenary review by this Court is not warranted.

---

[5] There is nothing that "defies reason," Petition, 13, in a voting practice exempt from Section 5, either because it was authorized by law in effect prior to the date of coverage or was actually precleared, being subject to challenge under Section 2. *See, Thornburg v. Gingles, supra,* finding a legislative reapportionment in violation of Section 2 which had been previously precleared under Section 5.

IV. This Litigation Presents a Unique Set of Facts. Similar Issues Will Seldom Arise or Be Capable of Proof, and Therefore Review by this Court is Not Merited.

The facts underlying this litigation are unique, both as a matter of occurrence and of availability of proof of racial purpose and effect. Seldom will there be recorded evidence of the decision to place a ballot issue on a date on which blacks would be expected to turn out in relatively high numbers, that public officials would rescind that decision and attempt to move the referendum to a day after a national holiday with expected low turnout, that black and white citizens would be divided over referendum proposals in the same election, that proponents' motivations in structuring the election would be contemporaneously recorded, that the ultimate vote would be so close and so racially polarized that proof is available not merely of minority vote dilution, but that the outcome of the election would have been different absent the dilution.

Similar litigation will seldom arise such that there is a need for plenary review, and as the court of appeals noted, its "holdings do not have any far reaching impact on the manner in which public bodies in Georgia may offer propositions to the voters." 15a.

CONCLUSION

For the foregoing reasons, respondents suggest that the petition for writ of certiorari be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

C.A. 88-166-1-MAC (WDO)

[Filed May 27, 1988]

[686 F.Supp. 902]

DAVID LUCAS, et al.,
Plaintiffs,
vs.
JUDY TOWNSEND, et al.,
Defendants.

OWENS, District Judge

Plaintiffs in their complaint filed this 27th day of May at 2:20 P.M. contend that the Tuesday, May 31, 1988, bond referendum election to be held in Bibb County, Georgia, should be temporarily restrained by the receiving single district judge and preliminarily enjoined by the court of three judges – Circuit Judge James C. Hill, District Judge Duross Fitzpatrick and Chief District Judge Wilbur D. Owens, Jr., appointed this date by Chief Circuit Judge Paul Roney pursuant to 28 U.S.C. 2284(b) – because it is being held in violation of Section Five of the Voting Rights Act, 42 U.S.C. 1973(c).

Plaintiffs' motion for a temporary restraining order came on to be heard before the receiving single judge who heard evidence and argument from plaintiffs and defendants. At the conclusion of the hearing the parties were asked if they desired a further hearing preceding

the scheduled election before the court of three judges. All parties responded that if such a hearing were held, they would present nothing other than what was presented this afternoon so that it is agreeable with all for the court of three judges to decide this controversy on the basis of all that was presented to and heard by the receiving single district judge. Accordingly, the court of three judges conferred by telephone, carefully considered the contentions of the parties and decided as follows:

> Section Five of the Act, 42 U.S.C.A. § 1973c, provides that whenever a covered state or political subdivision "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . ." it may not utilize or implement such change until (a) it has secured a judicial determination in the U.S. District Court for the District of Columbia that the change does not have the purpose or effect of denying the right to vote on account of race or (b) it has submitted such change to the Attorney General of the United States and the Attorney General has not interposed an objection within sixty days. While the Act does not specifically provide for a remedy for failure to comply with Section Five, the Supreme Court has held that a complaint for injunctive relief to be heard by a district court of three judges may be filed in any U.S. District Court and that court if it is shown that Section Five applies must enjoin the utilization or implementation of such change until Section Five is complied with. *Allen v. Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed. 2d 1 (1969).
>
> * * *

> This district court of three judges is required to resolve any dispute as to the coverage of Section Five or, said more directly, to determine "whether such changes have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5." *Georgia v. United States*, 411 U.S. 526, 534, 93 S.Ct. 1702, 1707, 36 L.Ed.2d 472, 481 (1973). The question of coverage to be decided by this court does not include the ultimate question required by Section Five to be presented to the District Court for the District of Columbia or the Attorney General, i.e., whether or not the enactment in truth and fact has a discriminatory purpose or effect. *Perkins v. Matthews*, 400 U.S. 379, 383, 91 S.Ct. 431, 434, 27 L.Ed.2d 476, 482 (1971).

Plaintiffs contend that the school bond referendum scheduled for May 31, 1988, constitutes a "change," as that term has been defined under 42 U.S.C. § 1973c, and therefore, the bond referendum cannot be held on that date absent preclearance from the Attorney General's office. Plaintiffs support this position by citing the court to 28 C.F.R. § 51.17. This section provides in relevant part:

> (a) The conduct of a special election (e.g., an election to fill a vacancy; an initiative, referendum, or recall election; or a bond issue election) is subject to the preclearance requirement to the extent that the jurisdiction makes changes in the practices or procedures to be followed.
>
> (b) Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement.

Plaintiffs have also presented evidence that the Attorney General, has, in fact, refused to preclear the May 31st,

1988, election date[1] because he had not been provided with sufficient data to make an informed decision on the subject. Based upon these facts, and without any more evidence, plaintiffs assert that Section Five is implicated because the election, as scheduled, is a "change," and that it has the "*potential* for diluting the value of the Negro vote." *See Georgia v. United States*, 411 U.S. at 534 (emphasis added).

Plaintiffs have presented no evidence, however, that the standard, practice, or procedure for scheduling bond referendums presently being utilized in this state is any different from that in force or effect when the Voting Rights Act was adopted and/or extended. Even assuming that such is the case, the evidence presented before this Court has utterly failed to demonstrate that the holding of the bond referendum on May 31st, 1988, has even the potential for diluting the minority vote. Plaintiffs' argument is that there would be an adverse effect with regard to voting by minorities if a bond referendum, such as the one at issue, is conducted on a date other than the date of a statewide or national election. As the argument goes, this would be necessary in order to insure a large black voter turnout. We are aware of nothing in Section Five jurisprudence which requires such a result. There is no reason to suspect that blacks or whites will turn out in greater or less numbers in proportion to each other if the election is conducted at a time when only one issue is put before the voters, as opposed to a date when other issues

---

[1] Defendants have made an effort to comply with the Attorney General's regulations, however, their compliance was done under protest.

or races are pending. To find to the contrary would, in effect, restrict all special elections to being held at the time of a general primary or general election, and would entirely negate the purpose of having a special election law in the first place. Plaintiffs have presented no evidence to refute such a conclusion. Plaintiffs have cited the court to the Eleventh [*sic* Fifth] Circuit's decision in *Garcia v. Guerra*, 744 F.2d 1159 (11th [5th] Cir. 1984), however, this case is not controlling because the "change" therein clearly implicated the migrant farmworkers' ability to participate in the planned election.

While the court recognizes that the Attorney General plays a central role in formulating and implementing Section Five, and that his interpretation of the scope of this section is entitled to particular deference, the ultimate determination of whether a change is covered by Section Five is reserved for a three-judge panel in the local district court. *See Allen v. Board of Elections*, 393 U.S. 544, 562-63 (1969); and *Garcia*, 744 F.2d at 1163. The Attorney General's regulation making all discretionary special elections subject to Section Five's coverage is simply not supported by the language found in 42 U.S.C. § 1973c. The electoral action involved must constitute a genuine change from past practices, and further it must have, at minimum, the potential for discrimination. The facts as presented herein, do not demonstrate these requirements.

Accordingly, because plaintiffs have failed to present any evidence that the school bond referendum scheduled for May 31st, 1988, is a cognizable "change" under Section Five of the Voting Rights Act, and that the election will in some way discriminate against minority voters,

the court must and does hereby DENY plaintiffs' prayer for preliminary injunctive relief.

For the Court of three Judges, this 27th day of May, 1988.

/s/ Wilbur D. Owens, Jr.
Wilbur D. Owens, Jr.
Chief United States
District Judge
###

[108 S.Ct. 1763]

IN THE SUPREME COURT OF THE UNITED STATES

LUCAS ET AL. *v.* TOWNSEND ET AL.

No. A-898

JUSTICE KENNEDY, Circuit Justice.

This is an application to enjoin a bond referendum election scheduled for May 31, 1988, in Bibb County, Georgia. The applicants are five black citizens registered to vote in Bibb County. On May 27, 1988, a three-judge District Court for the Middle District of Georgia declined to issue an injunction, concluding that the applicants had failed to establish that holding the election now contemplated would violate Section 5 of the Voting Rights Act, 79 Stat., as amended, 42 U.S.C. § 1973c. The United States has submitted, and I have reviewed, a memorandum advising me that it supports the applicants' request for immediate injunctive relief. I have also reviewed and considered a submission by appellees in opposition.

I

On December 17, 1987, the Bibb County Board of Education resolved to place a bond referendum on the March 8, 1988 ballot, a primary election date popularly known as "Super Tuesday." The bond issue was intended to help defray the cost of air conditioning certain local schools. The Board subsequently voted, on January 4, 1988, to rescind its prior resolution. It resolved to postpone the referendum until May 31, 1988, when it would

be voted on with a second bond issue for the building of a new high school.

On March 7, 1988, counsel for the applicants requested the Board to rescind its vote calling for the May 31 referendum. In his letter to the Board, counsel argued that changing the date of the election from a primary day would adversely affect minority voter turnout. The letter also argued that the two bond issues had been combined in an effort to manipulate the minority vote, and noted that the call for the May 31 referendum had not yet been submitted for preclearance to the Voting Section of the United States Department of Justice.

On March 30, 1988, the State authorities applied to the Voting Section of the Civil Rights Division of the Department of Justice for preclearance. On May 25, 1988, the Civil Rights Division responded that "the information sent is insufficient to enable us to determine that the proposed change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," and asked for additional information, including a "detailed explanation of the reason for choosing May 31, 1988, as the bond election date."

The Division also requested that State authorities respond to allegations (i) that the Super Tuesday date had been abandoned because the turnout of black voters was expected to be high on that date, and (ii) that the two bond issues were consolidated to prevent black voters from voting separately on each of the proposed projects. Finally, the Division noted that the Attorney General has 60 days to consider a completed submission, and that the

period would begin to run upon receipt by the Division of all necessary information.

Applicants sought an injunction prohibiting the Board from holding the election on the ground that the election had not been precleared by the Attorney General in accordance with Section 5. On May 27, 1988, the three-judge court denied the request for an injunction. The court stated that it was required to determine whether the actions proposed "have the potential for diluting the value of the Negro vote and are within the definitional terms of § 5." Opinion, at 3, quoting *Georgia v. United States*, 411 U.S. 526, 534 (1976). It also adverted to the Attorney General's regulation providing that any discretionary setting of the date for a special election, which is defined to include a referendum, is subject to the preclearance requirement, 28 CFR § 51.17 (1987), and acknowledged that the Attorney General had not precleared the referendum.

The court concluded that the applicants had failed to present evidence that the procedures to be utilized in the upcoming election differ from those in use at the time the Act became law. Accordingly, it concluded that the referendum was not a "change" covered by Section 5. While the court noted that the Attorney General's regulation provides otherwise, it held that the regulation is not supported by the language of Section 5. Alternatively, the court concluded that plaintiffs had failed to show that holding the referendum on May 31, 1988, "has even the potential for diluting the minority vote." Opinion, at 4-5. Accordingly, the court declined to issue the injunction prayed for by the applicants. This application followed.

II

The principles that control a Circuit Justice's consideration of in-chambers applications for equitable relief are well settled. As a threshold consideration, it must be established that four members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *White v. Florida*, 458 U.S. 1301, 1302 (1982) (Powell, J., in chambers); *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). I must also be persuaded that there is a fair prospect that five Justices will conclude that the case was erroneously decided below. See, *e.g.*, *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). Finally, an applicant must demonstrate that irreparable harm will likely result from the denial of equitable relief and, in appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public. See *Rostker v. Goldberg*, *supra*, at 1308; *Times Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1304 (1974) (Powell, J., in chambers).

The substantiality of the federal questions presented by the case cannot be doubted. Section 5 provides that certain jurisdictions, including the one in which this case arose, may not implement any election practices different from those in force on November 1, 1964, without first obtaining approval from the United States District Court for the District of Columbia or, alternatively, from the Attorney General. Neither statutory requirement has been met in this case. The three-judge court concluded, however, that the discretionary setting of the date of a special election is not a "change" covered by the statute,

notwithstanding the provision in 28 CFR § 51.17 to the contrary. The conclusion is most problematic under our precedents, see, *e.g.*, *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178 (1985) (noting that it could not seriously be disputed "that a change in the date of an election, if effected by statute, requires approval by the Attorney General under § 5"), and I have concluded that four members of the Court would likely vote to note probable jurisdiction and that there is a fair prospect that the Court would vote to reverse the judgment below.

I am further persuaded that irreparable harm likely would flow from a denial of injunctive relief. Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election. Even if the election is subsequently invalidated, the effect on both applicants and defendants likely would be most disruptive. Further, although an injunction would doubtless place certain burdens on defendants, such burdens can fairly be ascribed to the defendants' own failure to seek preclearance sufficiently in advance of the date chosen for the election. On balance, I conclude that the equities favor the applicants. Today I have entered an order enjoining the election, pending the timely docketing of an appeal.

###

[Source: Affidavit of Michael Binford, R48, pp. 6-7]

Bibb County, Georgia

	r	R2	100% White	100% black
Jackson 1984	.99	.99	3%	69%
Jackson 1988	.99	.98	12%	104%
Sales Tax (No)	.68	.46	53%	71%
Dukakis 1988	.98	.95	30%	101%
Bonds (No)	.66	.44	43%	66%
Adams, 1986 primary	.98	.96	18%	91%
Hudson, 1986 primary	.95	.90	13%	83%
Adams, 1986 run-off	.93	.87	23%	103%
Harvey/Hill 1987 primary	.91	.84	56%	98%
Brooks, 1987 primary	.99	.99	17%	93%
Lucas, 1987 primary	.99	.99	16%	97%
Dillard/Huff 1987 primary	.98	.97	36%	95%
Brooks, 1987 general	.99	.98	39%	94%

Lucas, 1987 general	.99	.99	8%	96%
Brooks, 1979 primary	.99	.97	25%	93%

The first column reports the correlation coefficient between the votes and racial composition of the precinct. The second column indicates the amount of variance explained by the correlation. The third and fourth columns present the estimates from the regression equations for the percentage of vote that would be given to a candidate in homogeneous white and black precincts.

(3)

No. 90-1167

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE BOARD OF PUBLIC EDUCATION and ORPHANAGE FOR BIBB COUNTY, *et al.*,
Petitioners,

v.

DAVID LUCAS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1167

THE BOARD OF PUBLIC EDUCATION and ORPHANAGE FOR BIBB COUNTY, *et al.*,
Petitioners,

v.

DAVID LUCAS, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITIONERS' REPLY BRIEF

Petitioners the Board of Public Education and Orphanage for Bibb County, *et al.* (the "Board" or "School Board") respectfully submit this Reply Brief.

I. THE DECISION OF THE COURT OF APPEALS IN THIS CASE IS RIPE FOR REVIEW.

This case is ripe for review. The Eleventh Circuit's decision that respondents may maintain a cause of action under § 2 of the Voting Rights Act to challenge the decision of a validly-elected school board raises a clear-cut and important legal issue. Since the Eleventh Circuit's ruling is inconsistent with both the position of the Attorney General and this Court's summary affirmance of the § 5 claim in this case, immediate review is appropriate.

Respondents erroneously argue that because there has not yet been a trial on the merits, this case is not ripe for review by this Court. On the contrary, this Court has repeatedly granted petitions for writs of certiorari to review *before trial* decisions involving important legal issues "fundamental to the further conduct of the case." *E.g., Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964) (granting certiorari, before trial, to determine whether the Jones Act provides the exclusive right of action for wrongful death of a seaman killed in territorial waters of a state); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949) (granting certiorari, before trial, to determine whether the suit was barred under the doctrine of sovereign immunity); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (same).

The Court has been particularly willing to review cases before trial to determine whether a claim states a cause of action. *See Gillespie*, 379 U.S. at 153; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727 (1975) (granting certiorari, before trial, to determine whether the offerees of a stock offering who had neither purchased nor sold any of the offered shares may maintain a private cause of action for money damages under Rule 10b-5 of the Securities and Exchange Commission); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (granting certiorari, before trial, to determine whether a state inmate may maintain a cause of action under 42 U.S.C. § 1983 against the state corrections department medical director for inadequate treatment of a back injury).

These precedents leave no doubt that the Eleventh Circuit's decision in this case is ripe for review. The legal issue whether respondents may maintain a cause of action under § 2 of the Voting Rights Act to challenge the School Board's decision to submit a comprehensive capital improvement plan to the voters in a single bond issue is unquestionably "fundamental to the further conduct of the case." *Larson*, 337 U.S. at 685 n.3.

Moreover, the Eleventh Circuit's nullification of the bond issue has prevented the School Board from proceeding with its capital improvement plan. Local governments certainly need not await lengthy discovery and trial before challenging a federal court of appeals' intervention in local government operations. As Justice Powell observed in *City of Rome v. United States*:

> Unless the federal structure provides some protection for a community's ordering of its own democratic procedures, *the right of each community to determine its own course within the boundaries marked by the Constitution is at risk.* . . . Federal review of local voting practices reduces the influence that citizens have over policies directly affecting them, *and strips locally elected officials of their authority to chart policy.*

446 U.S. 156, 201 (1980) (Powell, J., dissenting) (emphasis added). Justice Powell's concerns in *City of Rome* are amplified here. Ignoring the views of the Attorney General and this Court's summary affirmance under § 5 in this same case, the Eleventh Circuit has improperly encroached on the authority of the School Board to manage the schools in Bibb County.

The School Board respectfully requests the Court to grant certiorari to resolve the inconsistent interpretations of § 2 and § 5 of the Voting Rights Act in this case and to protect the Board from improper encroachment by the federal courts.

II. THE COURT OF APPEALS' DECISION IS NOT FACT SPECIFIC AND AFFECTS THOUSANDS OF LOCAL GOVERNMENTAL BODIES THROUGHOUT THE UNITED STATES.

Contrary to respondents' assertion (Respondents' Brief in Opposition at 19), the issue whether respondents may challenge a validly-elected school board's decision as to what bond issue(s) to propose to the voters affects thou-

sands of local governmental bodies throughout the United States. Many, if not all, states require that voters approve decisions of local governmental bodies to incur bonded debt. *See generally* 64 Am. Jur. 2d *Public Securities and Obligations* § 132 (1984). Last year alone there were more than 4,000 general obligation bond issues in the United States, totalling more than $40 billion. Of those bond issues, over 1700—in an amount in excess of $10 billion—were earmarked for education. *American Banker Bond Buyer Yearbook 1991* pp. 23 and 99.

Bond issues plainly are an essential tool of local government. If the Eleventh Circuit is correct that "[m]inority communities have the right to vote for or against the *propositions of their choice*," 908 F.2d at 858. (App. A at 14a) (emphasis added), then many necessary and worthwhile projects throughout the country will be victims of protracted Voting Rights Act litigation.[1] This Court should grant certiorari to prevent this unfortunate result.

III. THE DATE OF THE ELECTION IN THIS CASE WAS SPECIFICALLY PRE-CLEARED BY THE ATTORNEY GENERAL AND IS NOT AT ISSUE.

Throughout their brief, respondents attempt to create the erroneous impression that petitioners manipulated the date of the bond issue election to assure low black voter turnout in violation of the Voting Rights Act. (Respondents' Brief in Opposition at 6-10, 15, 19). On the contrary, it is undisputed that the Board scheduled the referendum in this case for November 8, 1988, "the date of the general election, including the presidential elec-

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[1] Indeed, in this case the Board's comprehensive capital improvement plan has never even begun. The 17 new air conditioning systems, which respondents admit that they desired *and which were part of the comprehensive plan approved by the majority of the voters*, are still needed. Likewise, the new schools that were to be funded under the plan have not been built.

tion." *Lucas v. Townsend*, 908 F.2d 851, 853 (11th Cir. 1990) (App. A at 4a). *It is also undisputed that the Attorney General specifically pre-cleared the election date.* 908 F.2d at 853 (App. A at 4a). Respondents' discussion of the election date is very misleading and totally irrelevant to the issues presented in the Board's petition.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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(4)

No. 90-1167

In the Supreme Court of the United States

OCTOBER TERM, 1990

THE BOARD OF PUBLIC EDUCATION AND ORPHANAGE FOR BIBB COUNTY, ET AL., PETITIONERS

v.

DAVID LUCAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a school board's decision to include funding for several projects in a single bond issue referendum question is a "standard, practice, or procedure" under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. On December 17, 1987, petitioner Board of Public Education and Orphanage for Bibb County (the Board) voted to place a bond referendum on the ballot on March 8, 1988, the day of the "Super Tuesday" presidential primaries in certain southern States.[1] The bonds were proposed to finance air conditioning at county schools. A few weeks later, the Board voted to postpone the referendum until May 31, 1988. It

[1] Bibb County is located in central Georgia. See Pet. 8 n.2.

also voted to increase the amount of the bond issue so that the referendum would finance not only the air conditioning project, but also the construction of additional schools. Pet. App. 2a-3a; Br. in Opp. App. 7A-8A.

The Board requested preclearance from the Attorney General for the May 31 referendum, pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which requires, in pertinent part, that covered jurisdictions receive preclearance from the Attorney General or the United States District Court for the District of Columbia for changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." On May 25, 1988, the Attorney General informed the Board that he could not preclear the referendum without further information. Pet. App. 3a.

2. On May 27, 1988, respondents—black citizens registered to vote in Bibb County—filed suit under (1) Section 2 of the Voting Rights Act, 42 U.S.C. 1973; (2) Section 5 of the Voting Rights Act, 42 U.S.C. 1973c; and (3) 42 U.S.C. 1983 and the First, Thirteenth, Fourteenth, and Fifteenth Amendments. Alleging that their statutory and constitutional rights had been violated by petitioners in connection with the call for a bond issue referendum, they requested declaratory and injunctive relief. Pet. App. 4a; Br. in Opp. 3.

3. With regard to Section 5, respondents alleged that petitioners had failed to comply with the Section 5 requirement that covered jurisdictions obtain preclearance.

a. Respondents requested a preliminary injunction to enjoin the referendum pending the Board's com-

pliance with the Section 5 preclearance requirement. They pointed out that, under the Attorney General's regulations, the discretionary scheduling of a special election requires preclearance. 28 C.F.R. 51.17. On May 27, 1988, the same day that respondents filed their complaint, a three-judge court convened under Section 5 nevertheless denied respondents' request for a preliminary injunction. Br. in Opp. App. 1A-6A. The court held that the scheduling of a special election was not a "change" under Section 5 and had no potential for discrimination. *Id.* at 4A-5A.

b. Respondents sought an injunction from this Court, and the United States filed a memorandum supporting their request. On May 30, 1988, Justice Kennedy issued an injunction pending appeal. Br. in Opp. App. 7A-11A; 486 U.S. 1301. He determined that, in light of the Court's precedents, the district court's ruling that the setting of the date for a special election was not subject to Section 5 preclearance was "most problematic." Br. in Opp. App. 11A; 486 U.S. at 1305. He further concluded that "four members of the Court would likely vote to note probable jurisdiction," that there was a "fair prospect" that the full Court would vote to reverse, and that irreparable harm likely would flow from denying injunctive relief. Br. in Opp. App. 11A; 486 U.S. at 1305.

The postponement resulting from the injunction rendered the appeal moot, and the appeal was subsequently dismissed. Pet. App. 4a.

4. On June 9, 1988, the Board approved a $29 million bond referendum for the air conditioning project, school construction, and a magnet school program. It scheduled the referendum for November 8, 1988, the next general election date, and submitted and obtained preclearance from the Attorney General

for this scheduling decision. In October 1988, respondents again moved the three-judge court for a preliminary injunction, pursuant to Section 5, to enjoin the referendum; they argued that Section 5 required the Board to obtain preclearance not only for the date, but also for the "form" of the question, that is, the decision to combine funding for several projects into a single question. Pet. App. 4a-5a.

In light of the "novel nature" of respondents' contentions and the absence of authority on point, the three-judge court invited the Attorney General to submit the views of the United States on this issue. Pet. App. 42a. The United States submitted a brief as amicus curiae in which it argued:

> Here, the facts of record would tend to suggest that the defendants' discretionary decision to present the voters with a single vote on the entire bond project is not the kind of change subject to preclearance. Selecting a number of projects to be financed under one bond authority would seem to be a normal legislative decision unrelated to the process of holding elections. It is essentially the same kind of determination as the amount of bonded indebtedness required for a project, the interest rate the board is willing to pay or the term of the bonds.

District Ct. Amicus Br. 16-17.

Agreeing with this reasoning and noting that the Attorney General's interpretations of Section 5 are entitled to particular deference (Pet. App. 41a-43a), the district court denied respondents' motion on November 2, 1988. The court held that "the form or structure of a question on a bond referendum is not a standard, practice, or procedure affecting voting." *Id.* at 43a. In addition, the court ruled that the

Board's exercise of discretion in formulating the question for the referendum was not a "change" for purposes of Section 5. *Ibid.*

5. On November 8, 1988, the referendum took place as scheduled. The question presented to the voters read, in its entirety, "SHALL GENERAL OBLIGATION SCHOOL BONDS IN THE AMOUNT OF $29,000,000 BE ISSUED BY BIBB COUNTY?" The referendum carried by a narrow majority. Pet. App. 5a; U.S. Amicus Br. at 7, *Lucas* v. *Townsend*, No. 89-400.

6. a. By order of March 7, 1989, the three-judge district court entered a final judgment for petitioners on the Section 5 challenge, relying on the reasons set forth in its decision denying respondents' October 1988 motion for a preliminary injunction; the order also dissolved the three-judge court. Pet. App. 44a-45a.

b. On appeal, this Court invited the views of the United States, and the federal government submitted an amicus brief urging summary affirmance on the ground that the three-judge court had correctly ruled that the Board's decision was not a "standard, practice, or procedure" for purposes of Section 5. The United States argued that the decision under challenge was best characterized as "a question of educational and fiscal policy" rather than "a voting matter within the purview of Section 5." U.S. Amicus Br. at 11, *Lucas* v. *Townsend*, *supra*. The United States further pointed out that the argument in favor of coverage had too broad a reach, since it would render every decision about "the wording and scope of a bond referendum * * * a 'standard, practice, or procedure with respect to voting.'" *Id.* at 12.

This Court summarily affirmed the district court's judgment on January 22, 1990. Pet. App. 46a; 110 S. Ct. 858.

7. a. In March 1989—after the three-judge court's Section 5 decision, but before this Court's summary affirmance—respondents requested relief from the single-judge district court pursuant to Section 2, arguing that the Board's decision to combine funding for several projects in one question had resulted in black voters having less opportunity to cast an effective vote to fund the project of their choice. Respondents maintained that the three-judge court's Section 5 decision did not preclude acceptance of their theory under Section 2 because the scope of the phrase "standard, practice, or procedure" in Section 2 was broader than the scope of the identical language in Section 5. Pet. App. 18a-19a.

b. In June, 1989, the district court rejected respondents' arguments and denied their Section 2 claims. Pet. App. 17a-35a.[2] The court drew a distinction between decisions regarding the "method" of offering issues for approval by referendum, which would be covered by the Voting Rights Act, and discretionary legislative policy decisions, which would not be covered. Pet. App. 24a. The district court concluded that respondents had failed to establish that the Board's decision had been of the former rather than the latter type. The court found that respondents had presented no evidence that the Board's decision involved a policy or formula for determining the manner in which to present the referendum question.

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[2] The district court entered an order, titled "FINAL JUDGMENT," on June 8, 1989 (see App., *infra*, 1a), which stated that judgment was entered for petitioners on respondents' "claims under Section 2 of the Voting Rights Act."

Id. at 30a. Instead, "the evidence suggests that the decision to submit the proposed improvements to the voters in one question rather than in two or more questions was a singular decision premised upon the facts of this particular situation." *Ibid.* In making the decision, the Board was carrying out its representative mission to "pursue an agenda which benefits the community at large." *Id.* at 31a. The district court believed that in this respect the Board should "be afforded some freedom to engage in the traditional political tools of consensus-building and compromise to effectuate comprehensive plans for school and community development and improvement." *Id.* at 30a.

The district court further explained that "[t]o accept plaintiffs' position in this matter is to invite chaos. Any and all matters which are to be submitted to the electorate for its approval or disapproval * * * would be subject to challenge under the Voting Rights Act." Pet. App. 31a. As respondents had conceded in argument before the three-judge panel in the Section 5 proceedings, their theory of the case would render every decision about the construction of a referendum question a "standard, practice or procedure" under the Voting Rights Act. *Id.* at 31a-33a n.9.[3]

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[3] The district court also reasoned that the Board's decision to combine two projects into one referendum question could not affect minorities' opportunity to cast an effective ballot because "every individual qualified to vote * * * had the opportunity to express his or her approval or disapproval of the bond issue." Pet. App. 34a. The court thus concluded, as an alternative basis for its holding, that even if the Board decision was a "standard, practice, or procedure" it did not "affect voting." *Id.* at 35a.

c. On appeal, a divided panel of the Eleventh Circuit reversed. Pet. App. 1a-16a.[4] That court rejected the Board's contention that, with respect to the "standard, practice or procedure" issue, the Eleventh Circuit was bound by this Court's summary affirmance in the Section 5 case. *Id.* at 7a-9a. The court stated that this Court "may have" summarily affirmed the order dismissing respondents' Section 5 claims on the ground that the Board's decision did not constitute a "change" for purposes of Section 5, rather than that it did not implicate a "standard, practice, or procedure affecting voting." *Id.* at 9a.

The court then proceeded to decide, "as a matter of first impression," that "combining multiple bond projects in a single referendum" constitutes a "standard, practice, or procedure" with the potential to abridge minority voting rights under Section 2. Pet. App. 10a, 14a. The court acknowledged that it owed deference to the Attorney General's interpretation of Section 5, but held that "[w]e do not afford the Attorney General's interpretation of section 5 the same deference in resolving claims under section 2." *Id.* at 12a. The court stated that it could not agree with the Attorney General's characterization of the Board's decision as a policy determination analogous to setting the amount of debt to incur. *Id.* at 13a. Instead, the court concluded, the decision was better characterized as "a political decision with the potential for diluting or submerging the minority vote." *Ibid.* The court reasoned that the Board's decision to combine projects in one referendum "forced minority voters supporting one project to either vote in favor

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[4] Judge Roney dissented and would have affirmed the district court's judgment for the reasons stated in its opinion. Pet. App. 16a.

of other projects they might not support, to abstain from voting, or to vote against the project they supported." *Ibid.*[5]

The court of appeals held that it would not reach the merits of respondents' claims under Section 2 because the district court had not considered this issue. The court thus remanded the case to the district court for further proceedings on the merits. Pet. App. 15a.

In addition to their Section 2 challenge, respondents also advised the court of appeals that the district court had not decided their constitutional claims and argued that their constitutional rights had been violated. Resp. C.A. Br. 16, 31-32. Petitioners replied that respondents had waived their constitutional claims by not pursuing them in the district court. Pet. C.A. Br. 14. The court of appeals did not resolve this issue; it stated that, on remand, the district court should consider whether respondents' constitutional claims had been waived. Pet. App. 15a-16a n.7.

A petition for rehearing and a suggestion of rehearing en banc were denied. Pet. App. 36a-37a.

DISCUSSION

At the outset, we note that there is a possible defect in the court of appeals' jurisdiction. If not for this jurisdictional problem, we would conclude that the case warrants review, and would recommend

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[5] The court acknowledged that its approach would render all decisions to present multiple proposals in a single referendum question subject to litigation under Section 2, but pointed out that, under its reasoning, the identical decision would be excluded from coverage under Section 5 because no "change" would have taken place. Pet. App. 15a.

granting certiorari. In light of the serious jurisdictional question, however, we recommend granting the petition, vacating the court of appeals' decision, and remanding for clarification of the jurisdictional issue.

1. The jurisdictional problem arises from the fact that respondents' constitutional claims may not have been finally resolved in the district court. It is axiomatic that a court of appeals has jurisdiction—with exceptions not applicable here—only over orders of a district court that constitute "final decisions." 28 U.S.C. 1291. An order that resolves only one of multiple claims is not appealable as a final judgment, absent certification by the district court under Fed. R. Civ. P. 54(b).[6] See *Curtiss-Wright Corp.* v. *General Elec. Co.*, 446 U.S. 1, 3, 7-8 (1980); *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 431-438 (1956); 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2660 (2d ed. 1983). See also *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 583-584 (1980); *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 742-744 (1976).

Here, although respondents purported to appeal from the district court's "final judgment" (see note 2, *supra*), that order and the accompanying opinion disposed only of respondents' Section 2 claim. See Pet. App. 35a. The district court made no mention of respondents' claims under 42 U.S.C. 1983 and the First, Thirteenth, Fourteenth, and Fifteenth Amendments, which respondents had included in their complaint and in their proposed pretrial order. See Pet. App. 15a-16a n.7. Indeed, as noted, respondents themselves specifically stated in the court of appeals

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[6] The district court issued no such Rule 54(b) certification in this case.

that the district court "did not rule upon [respondents'] constitutional claims" (Resp. C.A. Br. 16) and that the district court "did not [d]ecide" those claims. *Id.* at 31. See also Br. in Opp. 5 n.2. The court of appeals, moreover, did not determine whether the district court had, in fact, resolved respondents' constitutional claims—a determination essential to establishing the court of appeals' jurisdiction. If, in fact, respondents' constitutional claims remained outstanding at the time the district court entered its June 8, 1989, judgment, that judgment was not an appealable order; the court of appeals lacked jurisdiction to enter the order on the merits from which review is now sought; and this Court would be unable to reach the merits of the question presented. See, *e.g.*, *Liberty Mut. Ins. Co.*, 424 U.S. at 740.

In light of this serious jurisdictional problem, we recommend that the Court grant, vacate, and remand for clarification of the jurisdictional issue.[7]

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[7] The court of appeals, of course, has jurisdiction to consider its jurisdiction, and this Court has jurisdiction for the same purpose. See, *e.g.*, *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). On remand, the court of appeals could either determine for itself whether a waiver of the constitutional issues had occurred or remand to the district court for that determination. In either event, if a waiver in the district court is established, appellate jurisdiction would be proper because no claims would remain outstanding in the district court, and the court of appeals could then enter an appropriate judgment and decision. If no waiver is established, however, the district court must either resolve the constitutional claims or issue a Rule 54(b) certification to permit appellate consideration of the Section 2 decision.

We note that both parties believed that appellate jurisdiction was proper in the court of appeals, and both cited 28 U.S.C. 1291 as the basis for jurisdiction. See Resp. C.A. Br.

2. As noted, but for the possible jurisdictional problem, we would recommend plenary review.[8] The court of appeals' decision is incorrect; it is, at the very least, in considerable tension with this Court's prior summary affirmance in this same litigation; and it has potentially broad ramifications.

a. The decision below is wrong. For the reasons set forth in the brief we filed in response to this Court's invitation in the Section 5 appeal in this case, the wording of a bond referendum is not a "standard, practice, or procedure" for purposes of the Voting Rights Act. See U.S. Amicus Br. at 7-13, *Lucas* v. *Townsend*, *supra*. As we explained in that filing, the quoted language includes enactments affecting the casting of a ballot and the effectiveness of a vote, but does not include legislation unrelated to voting. The Voting Rights Act protects the right to vote; it does not address the content of substantive legislation unrelated to voting, such as what budget to approve or what programs to fund. There is thus a fundamental distinction between a "standard, practice or proce-

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viii; Pet. C.A. Br. 1. In view of the fact that respondents have requested injunctive relief, the court of appeals may also wish to consider the possible applicability of 28 U.S.C. 1292(a); we doubt, however, that the provision affords a basis for jurisdiction in this case. See, *e.g.*, *Stringfellow* v. *Concerned Neighbors In Action*, 480 U.S. 370, 379 (1987) ("This Court has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have a serious, perhaps irreparable, consequence, and that the order can be effectually challenged only by immediate appeal.") (internal quotation marks omitted).

[8] Indeed, if the Court concludes, contrary to our submission, that no serious jurisdictional question is presented, then we recommend that the Court grant certiorari.

dure" affecting voting and a policy decision that does not concern voting. See *id.* at 8-10.

As we further explained in our prior filing, the Board's decision in this case to combine several projects into a single referendum question is not a "standard, practice, or procedure" under the Voting Rights Act, but rather a question of educational and fiscal policy. The Board decided to fund all the projects at once or not at all; this is a policy decision no different from a legislative decision to include a certain combination of projects in an appropriations bill, or none at all. Neither is covered by the Voting Rights Act. See U.S. Amicus Br. at 11, *Lucas* v. *Townsend*, *supra*.

b. The decision below is also, at the very least, in considerable tension with this Court's summary affirmance of the Section 5 appeal in this litigation. Contrary to the Eleventh Circuit's supposition (see Pet. App. 7a-9a, 15a), it is unlikely that this Court's affirmance rested on the ground that the Board's discretionary decision was not a "change." The "Questions Presented" in the Jurisdictional Statement in that appeal did not squarely present this issue for review. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance rejects "specific challenges presented in the statement of jurisdiction"). In addition, the United States argued that this Court need not consider whether the district court had correctly ruled that the decision under challenge was not a "change" under Section 5, noting that prior authority of this Court pointed to the opposite conclusion. See U.S. Amicus Br. at 13-14 n.9, *Lucas* v. *Townsend*, *supra* (citing *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985)). It thus appears far more likely that this Court affirmed the judgment on the basis of the district

court's conclusion that respondents had failed to show a "standard, practice, or procedure" on the facts of this case. See *Mandel*, 432 U.S. at 176 (summary affirmance should be interpreted "as applying principles established by prior decision to the particular facts involved," rather than as "breaking new ground").

The fact that the present proceedings arise under Section 2 rather than Section 5 does not undermine the precedential force of this Court's prior ruling. Section 2 and Section 5 use identical language to define the scope of coverage: "standard, practice, or procedure." The close relation between Section 2 and Section 5 presents "a classic case for application of the 'normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" *Sullivan* v. *Stroop*, 110 S. Ct. 2499, 2504 (1990), quoting *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (further quotations omitted).[9]

The court of appeals' decision not only rejected the most likely basis for this Court's summary affirmance; it also apparently interpreted the Court's summary affirmance to mean that the wording of the

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[9] The court of appeals stated that, in view of its interpretation of this Court's summary affirmance, it did not need to consider whether the phrase "standard, practice, or procedure" has a broader scope under Section 2 than under Section 5. Pet. App. 9a n.6. The court of appeals' decision fails, however, to address the three-judge court's determination that the content of the bond referendum at issue in this case was not a "standard, practice, or procedure" under Section 5. See Pet. App. 43a. The court of appeals' decision thus either squarely conflicts with the three-judge court's conclusion, or necessarily rests on the flawed proposition that the language in Section 2 has a broader scope than the identical language in Section 5.

bond referendum was not a "change" sufficient to trigger Voting Rights Act coverage. Pet. App. 9a, 15a. We have considerable concern about such a holding and strongly doubt that this Court intended it; the result of the court of appeals' decision, however, is that the Eleventh Circuit now seems to have interpreted this Court's decision as standing for that proposition.

c. The decision below is also of broad significance. As we pointed out in our amicus brief in the Section 5 appeal, the potential reach of respondents' theory is enormous. Respondents' theory would potentially extend Voting Rights Act coverage to the wording and scope of every bond referendum. See U.S. Amicus Br. at 12, *Lucas* v. *Townsend*, *supra*. See also Pet. App. 31a-33a n.9. Given the enormous possible impact of the holding below, this Court's review would be appropriate, absent a jurisdictional problem, to decide the Section 2 coverage question.

d. There are, we recognize, other factors militating against review by this Court at this time. The question presented is a novel one; petitioners cite and we are aware of no other cases presenting the issue. There is, accordingly, no conflict among the circuits. In addition, the fact that the decision is interlocutory —because the court of appeals remanded for a trial on the Section 2 claim—counsels against review. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327 (1967). Petitioners would have an opportunity to raise the issue on which they seek this Court's review on appeal from the district court's disposition of respondents' Section 2 claims after trial.

At the same time, there is at least considerable tension between the decision below and this Court's prior summary affirmance, and the question presented in-

volves a preliminary matter of coverage not likely to benefit from proceedings at trial. We understand this Court to have already decided the question presented under Section 5; it would seem curious to allow further percolation of the issue under Section 2 in the circuits if that is indeed the case. For these reasons, we submit that, if there were no jurisdictional problem, plenary review would be appropriate at this time.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for clarification of the jurisdictional issue.

Respectfully submitted.

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JUNE 1991

APPENDIX

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Civil Action No. 88-166-1-MAC(WDO)

DAVID LUCAS, ET AL., PLAINTIFFS

vs.

JUDY TOWNSEND, ET AL., DEFENDANTS

FINAL JUDGMENT

Pursuant to this Court's order dated June 7, 1989, and for the reasons stated therein,

JUDGMENT is hereby entered in favor of defendants and against plaintiffs on plaintiffs' claims under Section 2 of the Voting Rights Act.

This 8th day of June, 1989.

/s/ Gregory J. Leonard
GREGORY J. LEONARD
Clerk